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Growth of Nationality in the United States. 8°.

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GROWTH OF NATIONALITY

IN

THE UNITED STATES

A SOCIAL STUDY

BY

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PREFACE

THIS volume is the fruit of lectures which have followed for a series of years in the class-room a study of the Constitution of the United States. They break away somewhat from the technical and formal character of that chart of liberties, and discuss its connection, in development, with the national life it has so materially aided in calling forth, and with the social life which has sprung up under it. It is thus a vital, quite as much as a legal, growth that is considered; and the two together constitute a social study.

Those who are pursuing a similar line of work may, it is hoped, be aided by these discussions.

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GROWTH OF NATIONALITY IN THE UNITED STATES

Introduction

§ 1. NATIONAL life springs from physical conditions, but has its fruitage in social and moral ones. Its starting-point is usually unity in race. This carries with it unity in language and leads to unity in religion, in customs, pursuits, and civic institutions. We more often direct our attention to the starting-point, unity of race, but the affiliations in life which follow from it express the true force of nationality.

Natural ties subdivide, widen, and weaken; earlier ones are displaced by later ones; the divisive forces of development rend them asunder and introduce new terms. Nations to-day very separate will be found to coalesce if we trace them back far enough, and the life that is now embraced in strong national ties may suffer in turn dissolution. Nationality, as a social fact, is a constant achievement. There is a perpetual shifting of forces, external and internal. Harmonizing and divisive tendencies take on new relations to each other. The real unity in the common life is a moral one—an affiliation of aims, interests, and obligations. Nationality is a social growth out of the soil of physical conditions.

National life is the most comprehensive, conspicuous, and permanent of the organic products embraced in human society. It tends, with advancing civilization, to include, and to make definite, more and more of the social and intellectual relations between men. It is the natural foundation of the state. If the state has been formed in only partial accord with national ties, it begins immediately, by its own action, to develop and strengthen these ties. Failing of this, it readily falls to pieces. As civilization increases in complexity, the state necessarily takes upon itself, both in extending protection and aid, a greater variety of services; and is called on to render these services with increasing fulness and precision. There is, therefore, in the development of the state, a growing need of national life as a means of multiplying the common resources and harmonizing the common interests. The life which lies at the centre of the state must have its true unfolding in it and with it.

§ 2. The only organization which can be compared in comprehensiveness with that of the nation is that incident to religious belief and action, and which we call in connection with Christianity the church. When the two, the church and the state, cover the same territory and are commingled in their duties, the church claims the wider and the more absolute power. Indeed, if the two directly touch each other and run parallel with each other, this is the inevitable relation, the only logical order of dependence. The church cannot squarely confront the state and at the same time yield to it. Its claims, if claims it has, must be ultimate and supreme. The church and the state are but awkward copartners in the same tasks. The entire relation between them, therefore, has been shifted, or is being shifted, on to other grounds. The

authority of faith, absolute though it be, is accepted as purely personal and spiritual; and the authority of the state as collective and physical. The one, in its last expression, relies on the thoughts of men; the other rests as constraint on their actions. Thus viewed they are no longer commensurate with each other. Each may pursue its purposes, certainly not unaided or unaffected by the other, but uninterrupted by the other. The inner life of society, and so its outer form, will be profoundly modified by faith; but these modifications will steal in imperceptibly along spiritual channels. The scope and freedom of the state, in its efforts to build up the nation, will be felt by the church, but be felt in common with all other forms of social activity. The church thus becomes a life within a life. The outer life which it amplifies and elevates is the life of the nation. The two stand on terms of constant action and reaction, each resting back on the same social and spiritual principles.

§ 3. At the time of the formation of the Constitution of the United States, the forces which were acting divisively on the national life and looked to the development of separate States or groups of States, and the forces which tended to extend and consolidate the national life and make it co-extensive with race relations, were active and evenly balanced. The very designation, United States, bears witness to this coming together of those in many respects separate. A divided and a united development were alike open to the colonies which had now cast off foreign restraint and national unity. The turning-point between the two tendencies was reached at the close of the Revolution. The question was then raised and settled, which of the dividing ways should be taken.

The balance between these impulses was a very even

one, looked at not in the light of comprehensive principles but of existing interests. The forces which made for separation were relatively narrow, but were immediate and strongly felt. Those which looked to unity were much grander and intrinsically more weighty, but they called for a corresponding scope of thought and feeling to respond to them.

§ 4. Each of the colonies arose largely as a segregation of interests, of religious beliefs, of commercial ends, of personal tastes and social relations. Several things aided this original diversity. The various colonies, with marked peculiarities, drew to themselves those of a similar temper. The Puritan felt himself the more justified in expelling the sectarist who brought contention because a large country was open to him, and each colony had a kind of ownership, not only in the advantages, but in the social and religious atmosphere, it had created.

The distances between the colonies, and the absorbing character in each of them of its own pursuits, tended strongly to distinct development. Not only had the original emigration been much affected by divisive forces in English society; not only had the very fact of emigration intensified these attractive and these repellent impulses; the circumstances of each community were such as to unite them closely within themselves and separate them from other communities. The distances between them were much more formidable barriers than we can now think of them as being.

The precise phase of liberty which characterized the colonies tended to the same result. Their main contention was to secure and defend local government. Any government beyond this they associated with tyranny; the wider obligations were burdensome, to be accepted

only as a necessity. The local liberty which the colonies sought was of a narrow and somewhat refractory order, and stood very much in the way of any extended union. The feeling was instinctive that any concentrated government, any authority in the distance, would prove to be an encroachment on the activity and freedom that each colony enjoyed in ordering its own affairs. The spirit of liberty with them was not one subdued to a comprehensive sense of the wants of men and the growth of society, but was a restive temper which had shaken off many restraints, and was disposed to minimize organic claims. It was the individualism of the pioneer, who is vigorous to care for himself, and has only a restricted interest in the combining power of coming events.

While the Revolution had necessitated combination, its main purpose had been to cast off foreign authority. There was thus, in the movement itself, a divided tendency. The object of release being reached, the combining force was lost, and the local impulses gained new ascendency. The lessons of the past seemed to teach quite as distinctly local government as collective government.

The colonies had so little intercourse with each other, the dangers to which they were exposed were usually so restricted and peculiar to themselves, that, outside of New England, there had been but little combination or consort of action. Even in New England the federation of colonies was a weak, not a strong, tie; a secondary, not a primary, authority.

While the Revolution gave rise to concurrent action and drew out strongly supporting feelings, yet, as the struggle became protracted and severe, the effort to unite the colonies grew increasingly irksome and inefficacious.

Wilfulness, negligence, and disregard became conspicuous. When the close of the war finally came, it found the country in a state of exhaustion, disintegration, and dissatisfaction; unable to meet existing obligations and indisposed to incur new ones. The organic effort showed weariness and failure rather than growth. Under the pressure of the war, and still more when this pressure was removed, the States began to fall apart, each turning to its own affairs.

They had small occasion to congratulate themselves on the manner in which their collective duties had been performed. Nor had these duties become the occasion of increasing confidence in each other. It was quite possible, therefore, that the Federal Government, as it dissolved away in weakness, should not be replaced by any general union. The different sections of a large country, with distinct interests and divided feelings, stood ready to take up a sporadic development which would have slowly smothered the germs of national growth.

§ 5. The influences which made in an opposite direction were almost wholly of an ideal character, prevailing in the minds of a few only. They were the theoretical excellence of the proposed government, the attainable prosperity and power of the States when once united, the magnificence of the national life which might spring from the union, and the unbounded physical resources which stood ready to nourish its strength. Fortunately —with a fortune which has been rarely equalled in the world's history—the wider and more ideal aims prevailed. But the grander the conceptions before the minds of those who framed the Constitution and who secured its adoption, the greater the chasm which separated them from

the average feeling which prevailed in the several States. This chasm must be filled in. National life could not come at once as the fruit of resolutions or of civic institutions. It must spring up slowly under the new conditions provided for it. The greatness of the Constitution must be recognized; the manifold relations and duties it carried with it must be appreciated. It is this which is to occupy our attention; the growth of national life under the Constitution, the adaptation of the government to the people and of the people to the government till they coalesced in a compact and vigorous nation. The sense of common interests was to overcome the more obvious fact of divided ones. States and classes and pursuits were to coalesce on the basis of fundamental principles, and a patriotism was to spring up as wide as the ties of race which drew the colonies to each other, and as comprehensive as the unmeasured gifts of nature which lay about them. The continental forces were to prevail.

§ 6. The divisions which were incident to the conditions under which the Constitution was framed and adopted, or which grew up later under its operation, were of four kinds: strife between a State or States and the General Government; strife between groups of States in an effort to secure the control of the General Government and determine its policy; contention between the several departments of government; a struggle between different interests and classes tempted to enlarge their power against each other under some perverted rendering of the public welfare.

For many years the most obvious lack of concord was found between the States, each asserting its own authority in opposition to that of the General Government. This strife lay in the nature of the case. The people of

the several States had been accustomed to an almost complete control of their own affairs. They had yielded with reluctance a considerable portion of this sovereignty to the United States. When the extent of the concession came to be felt they were disposed to resist the surrender, and to put upon it the lowest terms—terms oftentimes inadmissible under the purposes proposed and pursued by the national movement.

When the States—usually taking up the resistance to the central authority on some local and therefore weak ground—had been taught in succession the lesson of submission, there arose the more comprehensive purpose of laying hold of the National Government and making it the organ of one or other of the two types of social sentiment which divided the country, North and South. This became the great danger of the growing nationality and very nearly blasted it.

Attendant on these struggles, and of less moment than either of them, was a sporadic contention between the departments of government. The theory of the Constitution involved a separation of the three leading departments with mutual restraints. This was an equilibrium difficult to be maintained. The unity provided for lay in the people, and not in the organs of authority. These were to receive and express separately, yet harmoniously, the mind of the nation. The General Government has passed through critical experiences in this regard, but with results which have so far justified the expectations of the framers of the Constitution. If any weakness were to develop itself in the temper of the people, this danger would be sure to reappear.

As the government of the United States has steadily gained in power—its wheels making their revolutions

with increased ease and vigor—the social questions incident to national life have become correspondingly urgent. The one fundamental inquiry in national growth is whether all interests, ever gaining in magnitude, are being reconciled; whether classes are being united to each other in a wholesome ministration to, and participation in, the public welfare. The social life is the last and deepest expression of the national life. By the prosperity achieved at this point must we judge the nation and the hope of the years which lie before us. It is in this contention between the many and the few that we are now engaged. It was the reconciliation of all claims in universal liberty that constituted our original purpose, and it is the possibility of this harmony that now occupies us.

CHAPTER I

The Supreme Court

§ 1. THESE four forms of dissension, which we shall take up in order, have been all closely associated in their adjustments with the judicial department, whose complete expression is the Supreme Court of the United States. It has been in this tribunal that the underlying principles on which the national life is resting have found discussion and authoritative statement. A brief outline of the history of the Supreme Court will further our purpose in tracing the growth of nationality in the United States.

This history may be divided into four periods. The first extends twelve years, from the formation of the Government to the appointment of John Marshall as chief-justice in 1801. The second period reaches to 1835, the close of Marshall's service. The third period covers the term of Chief-Justice Taney, and is included between 1835 and 1864. The last period comprehends the intervening time to the present.

§ 2. The first period was tentative, incipient, and reached no very positive results. It required a prophetic eye in these earlier years to discern coming events; to see in a tribunal that had gained hardly any consideration one that should pronounce authoritatively on the tenure of legislatures and governors in the several States.

The court was presided over during these first twelve

years by John Jay and Oliver Ellsworth. John Rutledge acted in this capacity one term of the court, in the interval between Jay and Ellsworth, but was not confirmed by the Senate. Both Jay and Ellsworth were appointed as envoys extraordinary, the one to England and the other to France, and for this reason resigned their positions. This fact goes to show that the superior dignity and unrivaled importance of the office of Justice of the Supreme Court were not yet fully felt. When Jay, having accomplished his mission in England, was invited to resume his position on the bench, he answered: "I left the bench perfectly convinced that, under a system so defective, it could not attain the energy, weight, and dignity which were essential to its affording due support to the National Government." Thus the first five years of the Supreme Court, as interpreted by its chief-justice, promised failure rather than success in its great mission. Resignations were not infrequent. The number of cases brought before the court was small. When it first met, in 1790, no business occupied it. In Peters's *Condensed Reports* two pages are given to 1791, three to 1792, two to 1793, five to 1794, and seventy to 1795. A lean primer would embrace the five years of Chief-Justice Jay, as against the four and five fat volumes now annually issued. In the first years of Marshall, the average number of cases before the court each year was twenty-four; from 1875 to 1880 the average was three hundred and ninety-one.

The weakness of the earlier years was not due to any failure in the court itself, but to the slight weight as yet attached to its decisions. The channel was dry, but the waters had not been turned into it. Though the court was not able to do much to establish its own power, it

kept the way open for future growth. An effort was made by Congress, in 1791, to impose on the courts of the United States certain administrative duties in connection with pensions. The courts declined to accept them, as not embraced in their judicial work. President Washington addressed to the Supreme Court a series of interrogations, as a guide to his own action. The court declined to respond, on the ground that it might, by so doing, anticipate or embarrass its own judicial action.

§ 3. The Supreme Court, in this earlier period, though only the shadow of its later self, struck the true national key in its decisions. In the case of Hylton *vs.* United States, 3 *Dallas*, 171, the power of the General Government to lay taxes was fully sustained. A tax had been laid upon carriages. It was resisted as unconstitutional on the ground that it was a direct tax and yet had not been apportioned under article first, section ninth, and clause fourth of the Constitution: "No direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." The court sustained the tax without dissent. "The rule of apportionment was to be adopted only when it can reasonably apply." The limitation failed when it was inapplicable, not the power to which it pertained. There was but one restriction on this power in the Constitution—that no tax should be laid on exports. The two limitations in method, that of apportionment and that of uniformity, were to be wisely employed according to the nature of the case. The word "direct" was not an absolute designation. "The Constitution contemplated no taxes as direct but such as could be apportioned." The applicability of the limitation must appear in the tax itself. No technical or verbal difficulty was allowed to restrain the court from

the fullest assertion of the cardinal power of the General Government, that of taxation.

In the case of Ware *vs.* Hylton, 3 *Dallas*, 199, the treaty of 1783 was sustained as the supreme law of the land. The Legislature of Virginia, in 1779, had directed that debts owed to British subjects should be paid into the loan office of the State. The Supreme Court accepted this action of the State as lawful, but regarded the law as annulled by the treaty, and the claims of English citizens as having revived. The claimant could " meet with no lawful impediment " in the collection of his debt. This was a practical assertion of the supremacy of the General Government, and was most distasteful to the States.

§ 4. The second period was ushered in by a sharp contention between the two political parties as to the construction of the courts. The Federalists, the friends of a vigorous central authority, had favored the judiciary as the key of the position. The Republicans, jealous of the power of the General Government, were disinclined to the courts, as an independent expression of this power. The Federalists, when about to yield up the control of the government, constituted six new courts and appointed sixteen judges. The Republicans, under the lead of Jefferson, when they entered on authority, abolished the new tribunals, and so got rid of the Federal judges.

A similar temper was manifested in the impeachment of Judge Chase. Judge Chase, an associate justice, a man of a strong and impetuous character, and a thorough Federalist, had said indiscreet things on the bench, and taken some conspicuous part in political action. This was made, on the accession of Jefferson to the presidency, the ground of an impeachment, conducted by John

Randolph. The impeachment failed, and by its failure secured the safety of the judges from this method of political attack. Randolph submitted an amendment, that the judges of the Supreme Court and of all other courts should be removable by the President on the joint address of both Houses. This passionate effort passed by and left the position of the judges more unassailable than before.

The second period, as a period of great productive power, was prepared for by the appointment of John Marshall, a last bequest of John Adams. Many circumstances favored the influence which fell in so unusual a degree to Chief-Justice Marshall. He was a Virginian. He had a wide practice in the law, and had rendered important public service. He was a wise and staunch supporter of the Constitution and of Washington's administration. He was not simply a man of profound comprehension and superior legal acumen; he added to these endowments a sound estimate of the general welfare. In integrity of thought he had no superior. He was preëminently fitted to expound the Constitution, and build up, by means of it, the national life. No man in our history has rendered more apt and more acceptable service. During a long period, in which the Constitution was taking form, he consolidated the judicial principles applicable to our wants, and gave them weight in our counsels. His work went steadily forward almost without a flaw. The simply technical and formal bearings of a case were wisely subjected to the national interests involved in them. The spirit of his method is fully expressed in McCullock *vs.* Maryland, 4 *Wheaton*, 316. The point at issue was the right of the State of Maryland to tax branches of the Bank of the United States. This in-

volved the question of the constitutionality of the Bank of the United States. The question of the constitutionality was the primary discussion contained in the opinion. Marshall held that while no distinct right was given to the General Government to charter a bank, the great powers explicitly conferred to lay and collect taxes, to borrow money, to regulate commerce, to declare war, drew after them this power. "In considering this question, then, we must never forget that it is a constitution we are expounding." "The general views and objects of the Constitution are to prevail." "The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

This line of argument excluded all idea of strict, or of free, construction as a rule of procedure, and accepted the one or the other as the primary purpose of the Constitution called for it. This opinion lent itself readily, at a later period, to the support of the constitutionality of greenbacks.

Jefferson did not regard the purchase of Louisiana as constitutional. Marshall had no hesitancy in reference to it. Insurance Co. *vs.* Canter, 1 *Peters*, 511: "The Constitution gives power to make war and peace and treaties. These cover the right to acquire territory." The Constitution, rendered in this spirit, offers little obstruction to the leading objects of national life. The attention is directed primarily, as it should be, to the fitness of the given act.

There was a natural antipathy between Jefferson and Marshall in their political opinions. In the opposition which springs up between individualism and collectivism, prior to their reconciliation in sound and sufficient gov-

ernment, Jefferson decidedly favored individualism, and looked with apprehension at the efforts to found a strong, central authority. He himself never hesitated to use the power at his disposal,—as in the purchase of Louisiana and in laying an embargo—and yet he accepted a well ordered and comprehensive government with distrust. He did not see clearly that personal liberty, if it is truly the liberty of all, needs at many points the restraints, and in many ways the aid, of firm and adequate law. Marshall said of him that "he was ready to increase his personal power at the cost of his official power." Marshall distinctly saw that well defined official power is the only true expression and defence of personal liberty—maintaining its metes and bounds—and that personal liberty, arbitrarily asserted, becomes at once tyranny. Liberty and law necessarily enlarge with each other and define for each other the terms of action.

Jefferson, looking upon the Supreme Court as the chief instrument in completing and establishing the General Government, said of it: "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric." Randolph spoke of the Supreme Court as "the cave of Trophonius."

Jefferson and Marshall, administering the government in its executive and judicial branches, notwithstanding the detached character of their duties, came readily into collision. Marshall was compelled, during most of his term of service, to encounter in the executive department a temper only partially concurrent with his views, and to satisfy himself with a clear enunciation of the law when unable to enforce it. In the case of Marbury *vs.* Madison, 1 *Cranch*, 137, he administered a rebuke to Jefferson

and Madison for retaining a commission which had been made out, at the close of the administration of John Adams, for Marbury as justice of the peace, but had not been delivered. In the trial of Burr, Marshall ordered the presence of Jefferson with documents. The order was disregarded. In the case of Smith *vs.* Ogden, Jefferson directed the cabinet to neglect a similar summons.[1]

Marshall's service as chief-justice was the more difficult and the more valuable because it was rendered at a time when the executive branch of the government was strongly under the influence of conflicting principles. The scope of the Constitution and its adequacy to meet the ends proposed by it were still to be established; Marshall held the Supreme Court firmly to its work. Its decisions became relatively numerous. Of the 1106 opinions delivered during his term of service, 519 were given by Marshall. Judge Story, who had been appointed as a representative of the Republican party, became loyal to Marshall and regarded his administration as the crowning period of the court. Marshall's influence was of so comprehensive, sober, and intellectual an order as to make it irresistible with a bench of judges.

§ 5. The third period was that of the chief-justiceship of Taney. Though this period did not have the same independent importance as the second period, it still subserved a distinct and valuable purpose. It brought forward correctives and qualifications to principles that would otherwise have become too absolute.

Taney's introduction to the court was not a fortunate one. President Jackson, in his hostility to the Bank of the United States, ordered Duane, Secretary of the Treasury, to remove from the Bank the deposits of the

[1] Henry Adams, *History of United States*, vol. iii., p. 450.

United States. He declined to do it, and Jackson dismissed him. He then appointed Taney, Secretary of the Treasury, and Taney removed the deposits. When, several months later, the appointment was brought before the Senate, the Senate refused to confirm it. This led Jackson, when the opportunity was offered, to appoint Taney chief-justice.

Taney was a man of unusual power and possessed of an astute, legal mind. Marshall had done his work wisely as well as thoroughly, and there was no reaction against it. Yet Taney directed his attention more explicitly to the rights of the States and of the people. While it was needful that an adequate rendering should first be given to the powers of the General Government, and to the fundamental principles of law embodied therein, it was equally needful that the fitting limitations of these powers should be laid down. In the case of Briscoe *vs.* The Bank of the Commonwealth of Kentucky, 11 *Peters*, 257, he held that the States could incorporate banks of issue. The regulation of the currency was a function which the General Government had not yet completely assumed; and now that it has assumed it, has found much difficulty in discharging it. Taney regarded such functions as open to the States in the absence of any action by the United States.

The chief question which arose in this case was whether bank bills were bills of credit, included under the restriction of the Constitution which prohibits the emitting of such bills by the States. In an earlier case, Craig *vs.* State of Missouri, 4 *Peters*, 410, in which the opinion of the court had been given by Marshall, bank-notes had been included in the definition of bills of credit. The definition had run: "To emit 'bills of credit' conveys

to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes of money, which paper is redeemable at a future day." The actual decision in the earlier case did not, however, require so broad a definition, and was now held to be consistent with the narrower rendering of the court. In the present case the question was again raised, and the words, bills of credit, as used in the Constitution, were confined to bills issued by the State on the faith of the State and designed to circulate as money. These were regarded as differing from bank bills and open to special objection on the ground that no adequate provision might be made by the State for their payment, and that there was no method of enforcing payment against the State.

The case occurred shortly after Taney entered upon his duties. The opinion of the court is regarded as due, in a considerable degree, to his influence. Judge Story, against his usual custom, filed a dissenting opinion. He referred to the fact that the case had been previously argued before the court, and that the opinion of the court at that time, sustained by the opinion of Marshall,—" a name never to be pronounced without reverence "—had been against the constitutionality of bank-notes issued by State institutions. When the United States established national banks, it prepared the way for the new bills, not by denying the right of the States to charter banks of issue, but by taxing the bills of such banks out of existence. The confusion has arisen, in large part, from the inability and the reluctance of the General Government to take to itself, and to exercise fully, its function of coining and regulating money.

The most marked, and a more favorable, example of a service rendered by Chief-Justice Taney was the restric-

tion—we shall have occasion to refer more fully to the case later—which he brought to the charters of corporations. This has borne important fruit in restoring to the people powers that had inadvertently slipped from them.

The chief-justiceship of Taney extended through the most critical period of the slavery controversy. He did nothing to abate the tempest, but himself rather suffered shipwreck in it. He would have been assigned a much higher position in public esteem had it not been for the Dred Scott decision.

§ 6. The fourth period extends from 1864 to the present time. Chase, Waite, and Fuller have been chief-justices. The constitutional and social questions of moment that have come before the court have been those involved in reconstruction, in the rights of corporations, in interstate commerce, and in the comparatively new, and as yet perplexed, problems of labor. Though these questions may at times have seemed less critical, they have scarcely been less comprehensive, in the interests covered by them, than those which have gone before.

The Supreme Court has, in this period, shown less unanimity of opinion than in its earlier history. The dissent has been frequent, and been sustained by a vigor of argument which has gone far in weakening the force of the decisions. The presiding judge has had less influence with the court. In the Slaughter-House cases, the very weighty opinion announced, which has served to define the relation of the States to the General Government, was given by Justice Miller, Chief-Justice Chase dissenting. He sustained a similar relation to the decisions which upheld the constitutionality of the greenback issue.

CHAPTER II

Strife between the States and the United States

§ 1. WE shall now take up in order the several forms of contention which arose in the slow growth of our nationality. The first of these was that between single States or groups of States and the United States. The disposition to resist the General Government appeared on a great variety of occasions, and extended at one time or another to almost every State. The States, accustomed, during a long period, to self-directed and comparatively unconstrained activity, were naturally reluctant and restive units in the new organization. It was unavoidable that considerable time should be consumed, and much friction be incurred, in defining the exact relation of the States to the General Government, and in accustoming them to a new and dependent position.

The Whiskey rebellion of 1794, which assumed considerable dimensions and received the support of some distinguished men, expressed a lawless and irresponsible temper rather than any definite rejection of the new authority. This rebellion, like Shay's rebellion, showed how loosely the ties of Government, even in the States, were resting on the community. No considerable danger could be met or pressure incurred without arousing restlessness and resistance.

§ 2. The discrepancy of opinion between the Federal-

ists and the Republicans led to a corresponding diversity between them in their national sympathies. England retained a strong hold on the Federalists, while France called out the enthusiasm of the Republicans. The French Revolution was at once so promising and so disappointing an event as to arouse a great deal of conflicting and vacillating feeling concerning it. Enthusiastic natures, cherishing a large hope for the race, were laid hold of as by a new force in human history. When the lack of sober and practical thought in the guidance of the Revolution became evident, and it began to fall headlong into the tyranny which lies in the path of a disproportionate popular movement, the conservative mind first withdrew its sympathy from it, and then became actively hostile to it.

Jefferson was thoroughly imbued with the social and civil philosophy of France. The sweep of this philosophy is seen in our Declaration of Independence. It tended to an extreme individualism, and was consonant with the feelings of those to whom our Revolution was a social theory on the one side and a lightening up of disagreeable authority on the other side. The aid which France had rendered us in the war of the Revolution imparted to this sympathy of the Republicans a color of gratitude and patriotism. The Republicans were slow to see the drift of the French Revolution. Even the tyranny of Napoleon, in many minds, was surrounded by a nimbus, arising from the fact that it had grown up as the ripe fruit of the Revolution. He was the last expression of the popular will and the enemy of hereditary authority.

The Federalists, on the other hand, notwithstanding the alienation of the war, saw much to admire in the English Government, a government that was slowly

coming to embody, in a working form, both strength and liberty. The traditions of the past held with them. In New England this sentiment, just in itself, was greatly strengthened by the commerce of the two countries.

During the first twenty-five years of our national history these divisive feelings of the two political parties were kept active and constantly played upon by the rapid and startling progress of events in Europe. It has always called for no little penetration to see, in the protracted struggle between England and France, the obscure, underlying instincts and principles on which it rested—the staid conditions of order and growth, on the one hand, and the enthusiasm of opinion, lapsing into irresponsible violence, on the other. Never were conflicting tendencies more commingled, more difficult of analysis, or more capable, on either side, of unfair presentation.

The two combatants were slowly driven to their utmost effort; and were neither disposed, nor were they able, to pay much regard to the rights of neutrals, whose interests were quite secondary to those involved in the war. All Europe became included in the strife, and we were left alone in the defence of international law. We could compel the respect of neither party. It was easy for either of the two political parties in the United States to reduce somewhat the sense of injuries suffered from the one country by dwelling upon those inflicted by the other country.

§ 3. The French, finding themselves widely opposed to existing ideas and institutions, and seized with the fervor of a new crusade, paid little regard to the rights of other nations which in any way interfered with their immediate purpose. It was a rare combination when the headstrong force of a revolution passed into the unscrupulousness of

a great military leader, and the primary rights of men were confused once more with the claims of power. From the beginning the French assumed that the people of the United States would fully sympathize with them and freely contribute to their success. Their agents addressed themselves directly to the people, and showed but scant respect for the Government. The United States was to be made a recruiting ground for the French service.

The press of the times was unscrupulous and violent. It made gross and unfounded attacks on the Administration. These onslaughts were the more dangerous because of the inexperience and weakness of the new Government. Men did not know how to estimate them. As yet there was no history to oppose to them; no dangers that had been overcome, no trials that had been outgrown, no successful services that had been rendered, no patriotism that had been accumulated. Timidity, distrust, and aversion were still felt toward the central authority.

This state of things gave rise, in 1798, to the alien and the sedition laws, designed to check the influence of foreigners and restrain the license of the press. These laws were neither unjustifiable in their purpose nor administered with special harshness. As directed, however, against a prevalent party, they called out great hostility and gave occasion to collective resistance. This early effort of the Government to defend itself became the ground of a still more direct attack upon it. This opposition expressed itself in the resolutions of 1798 and 1799, passed by the legislatures of Virginia and of Kentucky. The first State acted under the influence of Madison, and the second under that of Jefferson. The Virginia resolutions were less offensive than those of Kentucky, but they asserted the right of the State to judge infrac-

tions of the Constitution, and to resist them. These resolutions were sent to the other States and called out counter resolutions. Some preparation for resistance was made by Virginia. The Kentucky resolutions, in general tenure the same as those of Virginia, affirmed more distinctly the independence of the State. "To this compact each State acceded as a State and as an integral party; its co-States forming as to itself the other party."

These resolutions thus brought early into the foreground an idea which long and strongly possessed the public mind, and arose fresh in every State on any provoking cause—that the Government was a compact between the States, and not an independent sovereign power. Thus Josiah Quincy of Massachusetts, in 1811, said in the House of Representatives, on the occasion of the proposed erection of Orleans into a State: "So flagrant a disregard of the Constitution would be a virtual dissolution of the bonds of the Union, freeing the States from their bonds to each other."

Thus the Constitution was not simply a contract between the States, but one which could be set aside by any single State when any action of the General Government was regarded by it as an infraction of the reciprocal obligations. Almost any policy, unacceptable to any considerable portion of the people, might thus be made, and was often made, the ground of a resentful denial of the claims of the United States upon the several States. The growth of nationality thus became slow and painful, and was in constant collision with local interests and attachments.

The resolutions of Virginia and of Kentucky, in making each State a judge of infractions of the Constitution, con-

founded a revolutionary with a constitutional right. The ultimate defence against tyranny is the right of the people to judge and set aside any government; but no government recognizes within itself, as a part of its own safeguards, such a provision. A revolutionary right is, in its exercise, revolt.

§ 4. In 1798, we had reached the very verge of war with France. Had it not been for the wisdom and forbearance of John Adams, which met with but slight acceptance in his own party, we should have been plunged into conflict. On the accession of the Republicans to power, in 1801, under the leadership of Jefferson, great apprehension was felt by the friends of the Government. As a matter of fact, however, the powers of the Government were not only not reduced, they were put to unusual service. Louisiana was purchased, though Jefferson confessed that he found no right conferred in the Constitution for such an acquisition. The purchase met the national mind, and Jefferson's suggestion of an amendment to the Constitution, conferring the needed power, was passed lightly by.

The chief resistance of the States to the General Government during the administrations of Jefferson and of Madison arose from their different sympathies with England and with France, and from the interests involved therein. Jefferson was disinclined to war. He was no warrior, and was on principle opposed to war. He held that foreign relations could be controlled by means of commerce—giving or withholding trade as national claims were respected or disregarded. He had fallen on a very unfavorable period for putting to the test so pacific a method. He strove to constrain the action of England by laying an embargo, which fell heavily on the New

England States. The Federalists complained bitterly of the measure as an abuse of the power to regulate trade.

Under a series of ineffectual efforts to protect our rights as neutrals, we drifted into the war with England of 1812. It found no acceptance in New England, and gave rise at once to a collision of claims between the States and the General Government. There were much illicit trade, and much indirect aid rendered to England. The war was never waged with unity and vigor. It called out no enthusiasm and yielded no honor, except in connection with the navy. The United States was at no time able to secure the troops called for, and the financial breakdown was complete. At the close of the war the United States would have had great difficulty in resisting a vigorous attack. It must have sunk under an energetic prosecution of the war by England, if the necessity itself had not sufficed to call out a new temper. At no time has the Union been weaker. The Essex Junta in Massachusetts arose in anticipation of a dissolution. Like a raft that has suffered the wrench and strain of rapids, the Government seemed ready to fall to pieces of its own accord.

§ 5. The progress of a war so distasteful to many of the people gave occasion for disloyal and divisive acts on the part of the States. The Senate of Massachusetts denounced the war as unrighteous. Massachusetts raised an army of ten thousand, and other States did much the same. The power of the General Government "to provide for calling forth the militia" and for "organizing, arming, and disciplining the militia" was a special object of attack. Governor Strong of Massachusetts declared that it belonged not to Congress, nor to the President, but to the governors of the States to determine when the exigency existed that justified the call; that the right

conferred by the Constitution to call out the militia to repel invasion applied only to actual invasion. The Supreme Court of Massachusetts sustained the Governor. Governor Chittenden of Virginia recalled the militia of the State from the national service. Thus the powers conceded to the United States were taken back once more by the States. The General Government became a helpless instrument to which they yielded less or more as suited them.

Webster, in 1814, spoke in the House of Representatives against a bill to encourage enlistments and to provide for a draft. Massachusetts and Connecticut, on the occasion of a law to enlist minors, passed acts instructing judges to discharge those enlisted without the consent of parents, and subjecting to fine and imprisonment those connected with the enlistment.

The dissatisfaction in New England culminated in the Hartford Convention. A convention of the New England States was recommended by a committee of the Legislature of Massachusetts. The recommendation resulted, in 1814, in the Hartford Convention. All but three of the delegates were from Massachusetts and Connecticut. It issued a manifesto remonstrating against the power assumed by the United States in calling out the militia, and proposed constitutional amendments. Unmindful of the inconsistency involved, it asserted that the General Government had not protected the States, and that the States should be allowed to appropriate taxes for their own defence. The State had the right, and was subject to the duty, of "interposing its authority" for the protection of its citizens from infractions of the Constitution. Thus the disruptive resolutions of Virginia and Kentucky were, occasion being given, echoed back from Massa-

chusetts and Connecticut. The spirit was the same in the two cases, though the pressure came from opposite quarters.

Delegates were sent to Congress to present and enforce these views. Before they had accomplished their mission, peace was concluded. The victory of New Orleans cast a lurid light on the close of a dark day, and the now insignificant complaints of the Hartford Convention passed out of the public mind with ridicule and indifference. That two States should, in time of war, by secret convention, have adopted measures so antagonistic to any central authority, was a painful disclosure of the weakness of the hold of the General Government on the public mind. The bonds of national life had hardly begun to form.

§ 6. While the unreasonable fears and exasperations of political parties were ready, for the first twenty-five years, to give rise, anywhere and everywhere, to impatience and resistance, local causes were also constantly operative to oppose one or another State to the United States. The debts owed by the States to the United States, under the adoption and adjustment of debts by the General Government at the instigation of Hamilton, were never paid. New York did something, in the construction of fortifications, to meet the claims against it. It was not possible to enforce any debts against a State. The sense of sovereignty was too strong. This difficulty showed itself early in connection with the provision of the Constitution by which suit could be brought in the courts of the United States against a State by citizens of another State. The States took offence at this unexpected imposition of new responsibilities. New York, Maryland, South Carolina, and Virginia had acquiesced in a sum-

mons of this kind. Massachusetts disregarded it, and proposed an amendment. Georgia, with a choleric temper somewhat habitual with her, imposed the penalty of death on any in her jurisdiction who should enforce such a process. This unwillingness of the States to be arraigned gave rise to the Eleventh Amendment, the first one that sprang from a special occasion. Thus a restriction, at one important point, was laid upon the United States in enforcing justice. The States gained immunity for offences against citizens; and, if they chose to exercise it, the power of repudiation. Later, when certain States purchased the debts held by their own citizens against other States, and then entered suit for their recovery, their claims were ruled out as an evasion of the amendment; *e.g.*, New Hampshire *vs.* Louisiana and others, 108 *U. S.*, 76. The Eleventh Amendment was in defeat of that thorough responsibility of the States, as members of a nation, to the citizens of that nation, which the Constitution was designed to secure. It was a concession to the jealousy of the States in reference to their own sovereignty and individuality.

§ 7. In 1778, Gideon Olmsted and three others were pressed into the British service on the sloop *Active*. They mutinied and captured the sloop. When they had nearly reached port, the armed brig *Convention*, belonging to Pennsylvania, took possession of the sloop. It was brought to Philadelphia and condemned as a prize. One fourth of the vessel was awarded to Olmsted and his companions, one fourth appropriated by the State, and the remainder divided among the crew of the brig. The case was carried by appeal to the Congressional Committee of the Federal Congress. The action of the State court was reversed. Judge Ross, of the Pennsylvania

court, refused to recognize the award of the Congressional Committee, ordered the sloop and cargo to be sold, and the proceeds divided as indicated by the first decision. The affair gave rise to embittered discussion, but rested without further results for thirty years. In 1808, Olmsted secured a writ of mandamus from the Supreme Court of the United States. The State militia resisted the service of the writ, and not till a posse of two thousand men had been called out could it be enforced. Pennsylvania then fell back on the ineffectual remedy of an aggrieved State —a constitutional amendment. This proposal took no hold on the other States, not suffering under a similar irritation.

§ 8. In 1819, the State of Ohio levied a tax of $50,000 on the branch banks of the Bank of the United States located in that State. When the payment of the tax was refused, the officers of the State broke into the banks, carried off the amount of the tax, and lodged the money in the State Treasury. Suit was brought against the officers of the State. While the suit was in progress, the Legislature of the State assembled and affirmed the doctrine of the Virginia and Kentucky resolutions of 1798. In case the tax was refused and a penalty pressed against the officers of the State, they were forbidden to give the banks any protection whatever. In 1820, the Bank of the United States was outlawed in Ohio, and open to any man's plunder.

A similar strife in defence of the banks under the patronage of the State was going on, at the same time, in Kentucky. The State banks, with no reliable basis, under a speculative fever, issued a large amount of bills. For a time these notes were accepted by the branch banks of the United States. When they were at length

refused, bankruptcy came at once, and the universal distress was ascribed to the Bank of the United States, which had checked the dangerous expansion. Those who had occasioned the mischief, so wide-spread and extreme, referred it, not to their own action, but to the arrest that action had suffered. An effort was made by taxation to drive the branch banks from the State. A bill was introduced into the Legislature to make void all sales of property under an execution issued in behalf of the branch banks. The State courts refused to support the laws passed by the Legislature. The conflict proceeded till new courts were established, and the judicial department was divided against itself throughout the State. Not till the election of 1826 did the friends of the sure and substantial ways of honesty prevail.

At the close of the War of 1812, disintegration between the States pressed close on dissolution. This fact, and the utter lack of financial wisdom which characterized many of the States, led to action as much at war with local prosperity as with the general strength. As far as the ultimate safety of the Union was concerned, the unwise policy of single States favored it rather than endangered it. The existing bonds were so lax that the immediate strain did not snap them, while growing experience came to their support and exposed the folly of the States.

§ 9. It was not unfortunate that the administration of the government fell for so long a period to the Republicans. They learned from their own experience the need of central authority, and what authority was gained was gained with less adverse criticism. Moreover the dissatisfaction was shifted from side to side, from place to place, and was not left to accumulate as an unredressed

grievance at any one point. Much that was condemned by the one party in opposition could be defended by what the same party had said and done in authority. By a change of parts, the discussion was thrown backwards and forwards in a way instructive to all. Power in exercise is sure to seek preservation and extension. It was said of President Monroe's first inaugural that it was good Federal doctrine.

At the close of the war with England, which still left us in possession of the opportunity of national life, a reaction arose in favor of the General Government. It gave rise to the Whig party. The chief principles of the party rested on a more forceful expression of the national impulse. They were a national bank, protection of home industries, and internal improvements. Henry Clay was the leading spirit of the new party. He was a man of strong national and patriotic impulses, eloquent in debate, and possessed of an attractive personality. He was admirably fitted to give expression to the new temper.

In the incipiency of the movement, he had the powerful support of John C. Calhoun. Later, this was withdrawn, as it became apparent that the slave States must suffer from the policy of protection. The strong, sombre character of Calhoun fell early under a malign shadow from his devotion to the interests of slavery. He had no longer the free use of his powers.

The case was somewhat the reverse with Daniel Webster. At first he hesitated to accept the protective policy, and afterward became its warm advocate. As Massachusetts was primarily a maritime State, it had no occasion to urge protection. When the doctrine began to prevail, it took up manufacture more extendedly, and so found its interests associated with discriminating duties.

A written constitution has this distinct evil,—that it gives occasion to technical discussions as to whether a given power is contained in the original grant, and these discussions obscure the more important question whether the given power, if present, can be advantageously exercised. The formal inquiry crowds out the substantial one of the wisdom of the proposed policy. This has been illustrated in discussions on the doctrine of protection. An effort was early made to disprove the right of Congress to impose protective duties. The power conceded to Congress to lay taxes is so broad, and the power to lay discriminating duties has been so wrapped up in this power, that the effort to prove its unconstitutionality has failed and been abandoned, with the exception of here and there a doctrinaire. The question whether Congress might wisely impose protective duties has received less thorough consideration because of the victory gained as to the power to impose them. It is a familiar weakness in human affairs that the power to do a given thing operates as a motive to do it. Again and again in our history the familiar right and necessity of taxation have hidden from sight some vital policy not necessarily associated with them.

Protection, when applied to so large a country as the United States, and one of such diverse interests, necessarily suffers the disadvantage that it brings out these local differences and turns them into local conflicts. Protection means the pursuit of one interest at the cost of other interests, at least for the time being. When the interests that are cherished and those that are burdened are widely separated from each other, and are the controlling industries of different communities, the gains that are ultimately to accrue to the less favored occupations are

neither obvious nor certain. A protective policy, therefore, vigorously pushed in behalf of local wants, may readily evoke an opposition at once reasonable and bitter. The tariff laws of 1828 called out such resistance from South Carolina—a movement led by Mr. Calhoun. The agriculture of the South, issuing in a few great staples that demanded a foreign market, had nothing to gain and much to lose by any limitation of trade. The tariff of 1832 provoked nullification.

For four years the rights of the States under the Constitution came before the public in hot discussion. The protective policy of the United States was instituted so early, grew by such insensible degrees, and was so closely associated with taxation, that the question of its constitutional rightfulness was blurred. It now gained power because of the local resistance offered by South Carolina. Resolutions introduced by Calhoun into the Senate affirmed: "That the people of the several States comprised in these United States were united as parties to a constitutional compact to which the people of each State acceded as a separate sovereign community, each binding itself by its own particular ratification; and that the union of which the said compact is the bond is a union between the States ratifying the same." Calhoun deduced from this statement the constitutional right of each State to interpret for itself the constitutionality of any act of the General Government, and to nullify the act if it regarded it as not included in the ceded rights.

Thus a doctrine which had all along been latent in the public mind, and which under some sudden pressure had frequently gained open expression, was once more distinctly enunciated, thoroughly discussed, and pushed to a decision. The historical and the rational basis of the

Central Government was once more reviewed. The fundamental question was whether the United States was, or was not, a true nation, with the rights incident to national life. Mr. Webster, the leading figure in the debate in behalf of the national idea, rejected the notion of a compact of the States, and became "the defender of the Constitution" as the organ of the popular, national life. The fact of a written constitution, enacted by the mediation of the States, tended to disguise its truly independent, organic character. Either rendering was historically open, though the two renderings were by no means equally germane to the facts and to the necessities of the case. It is incident to a written constitution that discussion, under any new exigency, is likely to turn on the comparatively barren verbal interpretation of a document rather than on the truly succulent question of the necessities of the case. We have wasted an immense amount of acumen in the refinements of constitutional law which might much better have been directed to the welfare of the nation.

In the development of the United States, either idea might have prevailed. The people could have affirmed themselves a nation or a confederacy of States. The implications of the two, in reference to national growth, are very different. The one makes way for national impulses, the other retards them at every step. Calhoun's resources lay in a close rendering of all the circumstances which attended on the formation of the General Government; in the fact that the States were the intermediate terms between the people and the Constitution, both in its formation and adoption, and in the fact that the powers delegated to the General Government were so carefully enumerated, as well as the limitations laid upon them.

The unspecified powers, the undefined areas, remained with the local governments. The States lost none of their identity and held tenaciously to their sovereignty in the transaction. The States neither fully understood the weight of the blow they were dealing to their own independence in establishing the General Government, nor would they, if it had been distinctly before them, have submitted to the concession. The Constitution was capable, from the very beginning, of being regarded in diverse lights, and was so regarded by different portions of the people. The apprehension and aversion which the Republicans felt toward the new government showed a keen sense of the disagreeable possibilities which were contained in it. The new germ might be kept cut back, or it might run up and overshadow all previous growth.

The resources of Webster were found in the undeniable necessity and fitness of national life, and in the seeds of that life which had been so deeply hidden in the Constitution. National growth could be secured and its principles interpreted in no other way. The constructive idea prevailed, and has become increasingly the thought of the people. The people have come to think and feel and act collectively, and not by States. In that debate, and in the events which accompanied it, we doubled the point of danger so far as State nullification was concerned. We should have reached quiet waters had not the strife taken on a new form in connection with slavery. This was not a rejection, under mere local interest, by one or more States of some particular rendering of the Constitution, but the growth of antagonistic social institutions between large sections under it.

§ 10. On the passage of the protective act of 1832, South Carolina in convention passed an ordinance of

nullification. Should the United States undertake to levy in South Carolina the duties now laid, " the people of the State would hold themselves absolved from all further obligation to maintain or preserve the political connection with the people of the other States." The Legislature proceeded to enact the laws necessary to give effect to the ordinance, and the Governor accepted the services of volunteers. President Jackson rendered the nation, in this emergency, a most acceptable service. Jackson, though incapable of distinguishing perfectly between his own passions and prejudices and the public welfare, was none the less thoroughly patriotic. Full of fire, and commanding, even by his faults, the popular sympathy, he was not easily to be thwarted. His opposition to a national bank, though not well sustained in theory and united to much personal feeling, relieved us of what was becoming, and threatened still more to become, a snare to the nation.

Jackson had shown so much sympathy with the Southern States, especially with Georgia, that a like attitude was expected toward South Carolina. He had not hesitated to narrow in the national authority when his own convictions of the interests of the South were involved. It did not, however, increase the favor felt by him toward South Carolina that she was under the lead of Calhoun, who had become obnoxious to Jackson. Jackson adopted at once an energetic policy. He issued a proclamation declaring the action of the State " incompatible with the existence of the Union, contradicted expressly by the letter of the Constitution, unauthorized by its spirit, inconsistent with every principle on which it was founded, and destructive of the great object for which it was formed." This firm attitude of Jackson

put a new color on the action of the State. A disastrous failure became imminent. Clay, with that conciliatory temper which characterized him, secured some modification of the offensive tariff, and this was made the occasion of a retreat on the part of South Carolina.

This action of South Carolina was the high-water mark of the refractory temper in single States. Our national life ceased to be threatened by the flying off, here and there, of single portions of the whole.

§ 11. The controversy with Georgia, which also occurred under the administration of Jackson, had a very different issue. Georgia, with slavery, found the neighborhood of the Creeks and Cherokees disagreeable to her; she also coveted the lands held by them under treaty with the United States. She trespassed on Indian territory, and was checked by John Q. Adams. Congress took no action to sustain the President. When Jackson succeeded to power, he was not disposed to enforce the rights of the Indians as against the State. The war in Florida against Indians and runaway slaves had been conducted by Jackson with arbitrary energy, and served to strengthen in him the Southern view of the subject. Telfair, an early governor of Georgia, had declared that Georgia would recognize no treaty with the Indians in connection with which the commissioners of the State had not been consulted.[1] She attacked the Creeks while at peace, and extended her laws over Cherokee territory. An Indian was arrested under a Georgia warrant for killing an Indian on Cherokee lands. He was condemned to be hung. The case was brought by writ of error before the Supreme Court of the United States. Georgia paid no attention to the writ, and hung the Indian.

[1] Hildreth's *History of the United States*, vol. iv., p. 446.

Samuel A. Winchester of Vermont, a missionary to the Cherokees under the direction of the American Board, was sentenced, for instruction given to the Indians, to four years' imprisonment. The case was brought before the Supreme Court of the United States. The sentence was pronounced illegal. The Governor of Georgia declared that he would hang him rather than surrender him. He remained in prison eighteen months after the decision against the right of the State, Winchester *vs.* Georgia, 6 *Peters*, 515. It was in reference to this case that Jackson was reported to have said, " John Marshall has made his decision; now let him enforce it."

This was an instance of lawlessness rather than of a professed effort to restrict the Constitution. The impudence of the State and the irresponsibility of the President were conspicuous, but they did not rest so much on a constitutional principle as upon the wants of a cherished institution.

§ 12. As the slavery controversy became absorbing, the modifications of the Constitution were sought primarily in the interests of that institution. The question no longer lay between sporadic impulses and national life, but as to what the form of that life should be. The Supreme Court of the State of Wisconsin, notwithstanding the decision of the Supreme Court of the United States, —Ableman *vs.* Booth, 21 *Howard*, 506,—pronounced the Fugitive Slave Law unconstitutional. The officers of the State and of the United States became involved in a conflict of authority that admitted of no legal adjustment. It was a case, however, in which the foundations of moral law, as well as of constitutional law, were being called in question. The wider issue and the narrower issue were included in each other. The safety of the

nation turned on the soundness of its ethical purposes. The foundations of social life were being broken up and relaid. In accomplishing this great change the Constitution necessarily suffered much strain, though the throes of the people were primarily those of establishing righteousness and liberty in the land. The conflict drew forth from a convention held in Wisconsin resolutions similar to those of 1798.

The single cases in which the States continued to set at naught the General Government were of secondary moment. The temper of resistance was disappearing, and the overshadowing force of the national life was more and more felt. In December, 1837, the steamboat *Caroline*, engaged in a marauding expedition directed against Canada, was captured on the American shore by a British force. Later, Alexander McLeod was arrested in New York as engaged in this act. The British Government avowed the capture as a public measure under its own orders, and requested the release of McLeod. Webster, Secretary of State, concurred in the justice of this claim, and communicated his decision to the Governor of New York. The claim was disregarded by the courts of the State, and a national interest thus taken from the control of the officers to whom it belonged.

§ 13. We are to bear in mind that the States started, under the new Constitution, in full possession, each by itself, of a government adequate for all ordinary civic purposes; a government to which they were strongly attached, and with which their political action was almost exclusively associated. It was not easy for them either to understand or to accept the concessions involved in the new organization. They only became slowly aware of the many restrictions they had incurred. Following the

lead of previous experience and familiar sentiment they were sure to go wrong.

They were especially disposed to lay taxes which affected adjoining States. Intercourse was so constant between the States that almost any impost was sure to put either the citizens of the State laying it to a disadvantage in trade, or to travel, in its effects, in an unconstitutional way, beyond the State. Justice Miller, in his *Lectures on the Constitution*, says "There are laws on the statute-books of nearly every State in violation of the Constitution in connection with taxes. It has been necessary for the States to abandon the field of imposts to the General Government."

The States have also, in neglect of the theory of the Constitution, continued to give terms of naturalization; and terms much more lenient than those of the United States. Foreigners have found their way into citizenship, not simply by the one door provided by the General Government, but by the many easily opened doors provided by the States. A result has been that the highest franchise of an American citizen, the right to vote, has been freely exercised by those still aliens under the laws of the United States. The electors in each State of the members of the House of Representatives have the qualifications of the electors in the several States of the most numerous branch of the legislature. Thus, though the defining of the conditions and rights of citizenship is one of the most sovereign acts of a nation, it has, in the United States, been left subject to the caprice of States whose primary purpose has often been the simple desire to encourage immigration. The States have determined their own electors, and the national and local elections have gone forward together under this provision.

A still more marked case of a quiet retention by the States of powers which they had been accustomed to exercise, but which were placed by the Constitution in the hands of the General Government, were those connected with the currency. The most critical part of a currency are the bills of credit with which it may be associated. The States were expressly forbidden to issue bills of credit. Yet a currency most untrustworthy and disastrous in its results prevailed many years in the United States, because Congress confined its action to the regulation of coin, and left the States, through banks that owed their rights to the States alone, to issue bank bills under very insufficient restrictions. The question was held under protracted discussion as to what was meant by bills of credit in the Constitution; whether the phrase did or did not include bills issued by banks incorporated by the States.

When, in 1863, the United States took possession of its own field by the establishment of national banks, it itself bore the appearance of an intruder, and drove out the real intruders by the modest method of a tax.

The General Government could not, at its formation, habilitate itself at once with its full complement of powers; nor were the States, in their quasi-sovereignty, ready to yield these powers. In no case, however, did the delay become disastrous, or materially alter the drift of events. Kindred circumstances and a kindred temper in the several States secured the public safety. The imperfection of method lay quite as much in the easy-going character of the people as in any deficiency in the Government. The new questions which should have been raised were not raised, because the necessity had not become urgent, nor the general mind prepared for them. The

General Government grew into strength as the need of that strength became apparent.

The open resistance that was offered to the authority of the United States failed of any serious results; chiefly because the interests which called it out were so local and transient. No general feeling or concert of action was involved in them. The current flowed on and left the petty grievance stranded behind it.

On the other hand, the national life inevitably gained momentum with the advance of years. Intercourse widened; commercial interests were multiplied and strengthened; the thousand affiliations of social and political life became more apparent and controlling. The great political interests that slowly gathered about the Central Government and accumulated under its shadow made themselves felt as an offset against local feeling. While the formation of the United States gave occasion to national life, the national life outstripped the occasion and built the people together in the natural integrity of their interests and temper. The ties of commerce were the bonds which longest resisted the social repulsion between the North and the South; but these ties themselves had been restricted to a narrow traffic rather than been left to form that intricate network of dependencies which unite free, active, and similar communities to each other.

So much has the balance of importance between the United States and any one of its constituent States been settled by the progress of events, that we are no longer in danger of smothering the national life by local governments; but of overshadowing and dwarfing local governments by the national life. Thus, in the disturbance in Chicago, in 1893, the national forces appeared almost at

once upon the scene in suspension of State authority. While we feel that the formation of the General Government served to remove obstructions in the current of national life which would have checked, and might have even diverted, its waters, we are compelled also to feel that the results which we to-day behold in the strength and unity of the people of the United States have been chiefly due to the vigorous social seeds, the new spiritual potentialities, which had been planted in virgin soil on an unoccupied continent. Such a life as this swept steadily and certainly aside all obstructions. It pushed toward the light so abundant in the heavens above it.

CHAPTER III

Strife between Groups of States for Control

§ 1. A SECOND contention slowly gathering force, that put in peril our national development, lay between groups of States, each group with contiguous territory, with distinct and well-defined interests. They sought for the possession of the General Government, and for its control in behalf of their own social and political policy. A deep separation of interests and principles underlay the contention. The distinguishing feature in the one group was slavery, and in the other, freedom. This difference became ever more observable in the progress of years, and carried with it many other differences.

The Southern States were agricultural, producing a few great staples—tobacco, cotton, sugar, rice. Society tended with them to a strong division of classes, and to the vesting of social and political power in the hands of slaveholders. The Northern States were diversified in their pursuits. They added commerce and manufacture to agriculture. Influence and wealth were subdivided. The lines dividing classes were less deep and more changeable. The popular tendency was toward a pure democracy. The aristocratic temper was shifting and suffered new forms of contradiction. The development of the Northern States rendered slavery more and more impossible.

Georgia and South Carolina were the supporting pivot

of slavery. Though Georgia, at the outset, under the influence of Oglethorpe and of the Moravians, accepted slavery with reluctance, it found such immediate support in the climate and in the character of the agriculture suited to the conditions of the people; it gave rise to so many distinctions in society which, once accepted, were not easily altered, that it struck deep in the soil and obtained rank growth. These States, having once adopted slavery, never hesitated in its support. It soon became the one ruling consideration in the framework of society. Its abolition would have meant complete reconstruction.

§ 2. These differences in conditions and pursuits between the two sections, powerful in themselves, carried with them increasingly results not to be altered or overcome. They were hardly capable of modification otherwise than by revolutionary violence. The adjustments made in the States in reference to slavery all occurred early, and were in general fulfilment of the forces involved in their development. Slavery was not strongly rooted in the States in which it was abolished.

An economic, social, and political life suited to slavery sprang up at once with it. Slavery necessarily begets a self-asserting and exacting temper. It gives a ruling class, and leisure for the exercise of the powers it confers. Those who have accepted the situation must be unscrupulous in maintaining it. Slavery is not an institution consistent with open ideas. The diversified and exacting industries of the North gave rise to very different social conditions. The people, intensely occupied with their private concerns, full of personal anxieties, had little leisure for public affairs, and lost aptitude in connection with them. This extreme individualism, both during

and since the slavery controversy, has been in the North a steadily perverting tendency in politics. Separate development has outstripped and overshadowed collective development. Northern statesmen, when brought in contact with Southern statesmen, were feeble antagonists. They lacked discipline, a single idea, and an overruling passion. The superior social status which lay back of the representatives of the North was more than compensated, in the contact of the two interests, by the much greater concentration of purpose in the South, and by a political habit which sufficed always to keep the strong men in the foreground. In form the South was as much superior to the North as was the North to it in ultimate force.

§ 3. The new Constitution dealt gingerly with the subject of slavery. The conditions were not such as to admit of any independent treatment. In a spirit more scrupulous than conscientious, more sagacious than wise, it avoided all direct mention of slavery. It gave the question as far as possible the go by and left its difficulties charged up against the future. It adjusted the political relations which involved it in a spirit of compromise, conceding and demanding as little as possible. Representation could be determined only by some estimate of population. Entire consistency in the social polity of the South would have carried with slavery a recognition of the slave as property, subject, therefore, to taxation; and a denial to him of citizenship, and therefore of the right of representation. But this was a conclusion, in its political results, in no way satisfactory to the South. The South wished the slaves, in reference to itself, to count as property; in reference to the North, as population. The compromise, so called, consisted in allowing three fifths of the slaves to be included in the basis of repre-

sentation; and also to be embraced in the apportionment of direct taxes. The concession lay chiefly with the free States. The slave constituted no portion of the citizens of the United States. The slave States purchased extended and permanent power by incurring the liability to heavier taxation. This unfair balance of power became, as the conflict increased in intensity, a growing source of dissatisfaction to the North. The compromise itself, by establishing an unjust relation, settled into an irritation. The political influence of the master was much increased by the slave, and yet that influence was used constantly against him. The master appropriated the citizenship of the slave as he appropriated everything else pertaining to him. The slave was made to aid in his own enslavement. The same firmness on the part of the slave States that led to this compromise enabled them to escape, for the most part, the slight concession involved in it. Direct taxes were rarely laid in the early history of the United States. This clause doubtless became one reason among other reasons why the burdens of the Government have been so uniformly placed upon products. The inequalities of taxation incident to imports have found no correction in taxes apportioned to ability. The first wrong begot a crop of secondary wrongs.

A compromise which involves a moral principle promises no success. We can divide and concede interests, but not obligations. Three fifths of an injury remains a complete injury. Moral relations hold firm, and are sure at some new point, in some fresh way, to become troublesome. Like the ghost in *Hamlet*, they pursue you underground as you move away from them. This compromise became an inflamed centre at which the economic and social irritations incident to the strife

gathered, till the composite evil issued in civil war. It is impossible to say whether this concession of our fathers was wise or unwise. It was inevitable. The issues between slavery and freedom were not fully made up. We accumulated preliminary grievances, we opened the battle and fought it through, all because of the slowness of our minds and the hardness of our hearts. This we were compelled to do; this lay in the circumstances, and it is impossible to delineate with accuracy the distressing events which would have followed any other line of action. We deferred a strife we were not yet prepared to push to its conclusion. Any action which presupposes clearer spiritual light was not then possible to us; and any action in the dim twilight that enveloped us would have had its own retributions. We pursued a great end by such means as were open to our conjoint moral capacity. We have still to wish that later crises may show more comprehension.

§ 4. The social and political conflicts, between the two groups of States, involved in the question of slavery, extended from the origin of the Government to the close of the Civil War, and have since been followed by a series of secondary adjustments still approaching completion.

This period of conflict may, for purposes of comprehension, be divided into three portions, flowing into each other without dividing lines. The earliest period, from 1789 to 1820, was one of disclosure; one in which the bearings of slavery became visible and undeniable. The tendencies contained in it and the direction it would give to our national development were no longer matters of conjecture, of hope, or of fear.

The second period, extending to 1845, was one of moral strife, of impassioned and bitter discussion of the

ethical bearings of the question. It was a contention confined to no part of the country, assuaged by no remonstrance, repressed by no fear. It did not lie between the North and the South, directly or alone. It divided men and bodies of men everywhere. Neighborhoods and churches and occupations and classes were involved in it. The poison which broke out in political action was generated in the entire social system. The moral convictions of the country were made up; the forces were rallied and accumulated which were to take part in and settle the final conflict. Rarely has it happened in the history of the world that so protracted and universal a moral ferment has preceded action; those who esteemed it pernicious, and those who thought it useless, were compelled to contribute to it. Those who regard the inner purgings of the thoughts as events of the most moment will always return with interest to this surging backward and forward of spiritual life. If the Civil War was a bitter war, fought through to an end, it was in these years which preceded it that the requisite energy was accumulated.

The last period was one in which the nation was chiefly occupied with the civil and political changes involved in slavery. The old equilibrium was passing away, a new equilibrium was to be secured. Every one was occupied with the possibilities of the case. The ellipse was breaking up. Around which centre should the new formation take place? The question could no longer receive an evasive or inadequate answer. Events had been slowly ripening from the formation of the General Government toward this result, and they now issued in the Civil War.

§ 5. At the time of the formation of the Union, slavery had not ceased in the Northern States. The flow of events and of public opinion was adverse to slavery, but

had not yet secured its complete abolition. In 1790, there were 40,370 slaves in the Northern States, somewhat more than half of them in New York. Slavery did not wholly cease in that State till 1827. New Jersey had 11,423 slaves. There were 657,527 slaves in the Southern States. The northern portion of these States, while possessed of many more slaves than the adjoining States of the border line, were not active in the defence of the institution. Virginia, in common with Delaware and Maryland, had forbidden the importation of slaves, and North Carolina discouraged it. South Carolina and Georgia were alone vigorous in the defence and extension of slavery. It was the ruling term in their social polity.

The sentiments called out by the Revolution, and which had found full expression in the Declaration of Independence, were expected to be much more effective than they actually were in the removal of slavery. The enthusiasm of liberty, which never thoroughly penetrated the average mind, shortly subsided, and left the less conspicuous, but more enduring, forces involved in economic interests and social life in possession of the field.

The ordinance of 1787 pertained to the territory already surrendered by the States to the Federal Government, a territory to be still further enlarged by concession and by purchase. It applied to that portion of territory northwest of the Ohio River, extending to the Mississippi and the Great Lakes. It excluded slavery and involuntary servitude. It was the first act of division between the two conflicting interests that prevailed in the nation. This ordinance was the starting-point under the new Constitution. Territory to the south of the Ohio was organized without restriction. This division disclosed a contention which lay quite beyond the compromises of the Constitu-

tion, and was of more moment than they. The nation must grow; was bound to grow rapidly. This growth must constantly renew the question of domestic institutions. Slavery and liberty must encounter each other, and jostle each other, at every forward step. It was not the concessions already made but the concessions to be made; not the things left behind it but the things before it, that perplexed the nation. The compromises of the Constitution settled nothing. They simply kept alive a menacing series of questions that lost none of their bitterness as they came up one by one. The national strength was in daily formation, the character of the nation in daily declaration. These issues, contained in the points of growth, retained their vitality,and their power to irritate the public conscience.

The territory northwest of the Ohio, easily conceded to liberty, was not so easily retained. The territory embracing Indiana and Illinois asked repeatedly permission to introduce slavery. William H. Harrison favored the movement. The territorial legislature, in 1806, established a system of indenture, which prevailed for a long time and was a modified form of slavery. The difficulty in retaining the territory conceded to liberty arose from the character of the immigration. Southern Indiana and Illinois, till 1809 parts of one territory, were settled largely from the South. Its occupants came with a strong predisposition to slavery. While one climate and one form of production may be much more consonant with slavery than another climate and other types of labor, the cherished sentiments of a people may still be the overruling force. Favoring circumstances were building up in the South a social state of which slavery was an essential feature. The feelings, convictions, and interests

involved in this form of society took on great propagating power. The two sets of influences, social and physical, constantly reacted on each other. Slavery was not a question of either alone, but of a composite force due to them both.

§ 6. This energy of an established institution was much augmented, in the case of slavery, during the close of the last century and the opening of the present century, by a great increase in cotton goods. Eli Whitney, who went from Massachusetts to Georgia as a teacher, was an important instrument in securing this result. His invention of the cotton-gin enabled a single man to do the work, approximately, of two hundred men. In 1791, the amount of cotton exported from the States had been 189,500 pounds; in 1803 it had risen to 41,000,000 pounds. Expectations, which proved extravagant, it is true, but which were in themselves plausible, put the South in the foreground of production. Charleston was regarded as a rival of northern seaports. It was slavery, chiefly, which disappointed these hopes. The increased production of cotton extended slavery, and raised the price of slaves in adjoining States. The slave-holding States were drawn into the current of prosperity. Slavery, a marked ground of distinction between the North and the South, carrying with it many differences and dislikes, became increasingly an occasion of union on the one hand and of separation on the other. Development carried the two communities ever more apart in all the sentiments and forms of life.

The deliberations of Congress showed from the beginning the divided temper which, in spite of commercial and national interests, ripened into civil war. Patriotism was no sufficient corrective of this constant chafing of

social sentiments. In the first session of the first Congress, a tax of ten dollars was proposed on each imported slave. In the second session, a memorial, addressed to Congress by the Quakers, gave rise to a protracted debate. In neither case did the discussion lead to any action. At this time the only State finally rid of slavery was Massachusetts. The conflict showed from the beginning the same extreme and violent opinion which went with it to the end. The nettlesome feeling, incident to a practical moral question, was always present. Protracted attack and defence influenced it, but did not beget it. The defenders of slavery took high ground, attacked their adversaries as meddlesome fanatics, rejected all interference as extraconstitutional, expressed their determination to defend their rights to the utmost, and in every way assumed an uncompromising attitude. The chief difference between earlier and later debates was that the strength of resistance was first found in Georgia and South Carolina. The division between free and slave States was not yet firmly drawn.

The same personal characteristics were manifest as later; here offensive insolence in the defence of slavery, there a bold word for liberty—as the speech, in the second session, of Scott of Pennsylvania. There were also the same sudden and weak concessions on the part of those whose relations pledged them to firmer action. Ames of Massachusetts, who had succeeded in reducing the tax on West India molasses from 6 to 2½ cents per gallon, and who had ridiculed the moral argument in its application to New England rum—then and since finding its chief market in Africa—came forward to help arrest any action against slavery. It was fitting that two forms of traffic—the one in rum to Africa, the other in slaves from

Africa—not in any way distinguishable in their moral temper, should have shown so early an affiliation. It is a mistake to suppose that this controversy of three quarters of a century was due to abolitionists. They and all were products of deeper causes. North and South alike were finding themselves spiritually under the stress of a great social issue, and suffering its discipline.

§ 7. This strife, present to us as a nation at any moment, early and late, showed how impossible it was to limit the question of slavery by the formal compromises of the Constitution. Slavery defines a social type—a type so distinct and radical as to embrace national character. The question was constantly recurring, whether, in one particular or another, it should have way in the United States. Madison urged that the right of Congress to tax imported slaves was a means placed at the disposal of the General Government to express its disapprobation of the traffic, and put itself right before the world; that slavery, as weakening the nation within itself, was a national concern, affecting in common all the States.

As it became evident that two incompatible tendencies were embraced in the Union, and that their relations to each other were by no means settled by the Constitution, a struggle between them for power, a desire on the part of each to shape the future of the country under the Constitution in its own spirit, were inevitable. While slavery, as a contradiction of the first principles of liberty, was on the defensive, it waged from the beginning an aggressive warfare in behalf of its own interests. Its situation compelled it to do this. The drift of events was against it. It must fight for a footing. The active anti-slavery sentiment of the North was largely the recoil of one moral temper against another. While there were

many busy with their own concerns and relatively indifferent, those who had in any degree, North or South, the prophetic spirit, felt that passing events were pregnant with consequences which must be shaped now or never.

§ 8. The South could not prevent the superior rapidity of growth incident to the unrestrained activities of the free States. The slave States, notwithstanding the unfair terms of representation conceded them, were increasingly outstripped in the House of Representatives. The Senate, however, which had been expressly shaped so as to maintain a balance of power between the smaller and the larger States, was used as the shield of slavery. On the admission of Tennessee, Kentucky, and Vermont the States were equally divided, eight and eight, between the North and the South. States were then admitted by pairs for a series of years; Ohio and Louisiana, Indiana and Mississippi, Illinois and Alabama, Maine and Missouri.

This method of admittance, and the maintenance of power incident to it, kept the question of territory, in its relation to slavery, constantly in the foreground. Slavery must ever gain more as a condition of retaining what it had gained. Once hemmed in, it was sure of being smothered.

The purchase of Louisiana and Florida was in such manifest furtherance of national interests, giving us the control of the Mississippi and rectifying our boundary, that it met with little opposition and hardly raised the question of slavery, though the purchase was in its favor. The question of territory was thus disposed of for a series of years without giving occasion to any conflict. In the meantime the affinities of the several States revealed themselves more positively, and the dividing line between

them became a widening one in the spirit and forms of social life. It was impossible that a contention between tendencies, so much in modification of each other, should rest for a moment.

§ 9. The earlier part of the present century was a period in which, throughout the civilized world, public opinion was being shaped against slavery and the slave trade. The United States, pledged by its institutions to freedom, could yet present, in connection with this great forward movement, only a half-hearted and fluctuating policy. We were especially put to disadvantage in our relations with England. We were putting forth efforts and making claims which involved some recognition, on her part, of property in slaves. We claimed compensation for the slaves carried off in the War of 1812. We desired the return of slaves set free by entrance into English ports. Slaves, in the coastwise traffic, were especially liable to be driven into the Bahama Islands. We fretted under the escape of fugitives to Canada. A slave-holding community cannot be at entire peace with its neighbors, without involving them in some concessions. The injustice shown to the Indian tribes of the South, and the high-handed measures of Jackson in Florida, were associated with the escape of slaves.

In 1807, when Congress, the limitation of the Constitution being about to expire, forbade the slave trade, the half-hearted temper with which it was done destroyed its moral force, and left the country open to an illicit traffic. The question arose as to what disposition should be made of negroes captured by the United States in the repression of the traffic. The first proposition was that they should be confiscated and sold for the benefit of the United States. The flagrant inconsistency of this pro-

position slowly made itself felt, and three counter-propositions were offered: that they should be bound out as apprentices in the free States, that they should be retaken to Africa, that they should be left at the disposal of the slave States to which they were bound. The last proposition prevailed. This meant that the General Government, having captured them, handed them over to slavery, but itself refused the price. It did not so much object to blood as to the price of blood found in its own hands. In the acrimonious debate which accompanied the prohibition, a chief aim of the South was to involve the United States, by implication, in a recognition of property in slaves; and of the North to escape, in the language used, this inference. As in the Constitution itself, words were more gingerly used than things. The thing was done, but, in concession to liberty, it was daintily done.

§ 10. The period from 1820 to 1845 was distinguished from that which preceded it by a more well-defined and open conflict of moral forces, a separation throughout the country between the defenders and opponents of slavery. This followed naturally from the firm, bold and aggressive temper which slavery disclosed. It was plain that the mere flow of events was not sufficient to settle the question; that it was one inevitably of victory or defeat. The struggle became more bitter, and lay not so much between the North and South, as between those, North and South, concessive to slavery and those unrelentingly opposed to it. This period, in turn, gave rise to the one that followed, in which the strife was merged in political events.

The opening of Arkansas to slavery, the admission of Missouri as a slave State, and the Missouri Compromise

of 1820, marked a new departure in the history of slavery. The advance lay not simply in the fact that slavery now passed the Mississippi, well to the north, and appropriated an extended, fertile, and strategic territory; that this addition no longer lay in a quiet completion of its own boundaries, but was an unexpected enlargement of those boundaries, it was found still more in the determined and aggressive temper involved in the act. In the long and heated debate which issued in the compromise, much was made of the clause of the Constitution that the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States. The South planted itself on this affirmation, and claimed, as a right under it, free access to all the territories of the United States. The position taken by the South was just only on the ground that slavery was a normal institution, and entitled to the same consideration and rights as the institutions with which it was associated. Slavery must be conceded a common-law position, its claims made one with the recognized mass of claims contained in citizenship. This was as if a cannibal should affirm an equal liberty with others in choosing his own food. The claims of the South could not be met on any other than wide social and moral grounds, and yet there was everywhere a constant denial of the moral character of the discussion. It was pushed back into civil law, where there was no principle plain enough, profound enough, authoritative enough to settle it. The logic of the debate, so ordered, inevitably tended to the conclusion, finally reached by the supporters of slavery, that black men had no rights, and could have no rights, under the Constitution; that the rights which had been conceded them, here and there, now and then, were transient, illusory, and illogi-

cal; that they stood in contravention of the extended rights of a great mass of citizens guaranteed them by the Constitution.

§ 11. Under this clause of the Constitution, as now interpreted, not only had slavery the same safeguards as liberty, it had superior ones. Slavery carried with it laws, customs, and sentiments which inevitably led to the exclusion of liberty. The two could not thrive side by side, and the rights associated with slavery shortly shut off those associated with liberty. The South, in defining its rights under the Constitution, virtually thrust aside the corresponding rights of the North under the same instrument. The only reconciliation was that attempted in Kansas: a bloody struggle during its territorial existence as a means of capturing its life as a State.

The attack of the South, foreshadowed in this debate, by which it planted itself on slavery as a primitive and indefeasible right, standing side by side with the other rights of a citizen under the Constitution, and incapable of attack or reduction on moral grounds, naturally drew forth a deeper and more determined protest. It was plain that the compromise of 36° 30′ was only a second barrier thrown up in defence of liberty, and would in turn be subject to attack.

From this time on, new courage, new tenacity, and new bitterness were shown in the conflict. It came to pervade society everywhere. Men like Benjamin Lundy and William Lloyd Garrison made of it a crusade. A spirit as unflinching and aggressive as its own confronted slavery. If the Constitution did open the way for the march of slavery everywhere under the ægis of the General Government, then it was what Garrison declared it to be, "A compact with death and an agreement with hell."

The assertion was an ethical rendering of the Southern interpretation of the concession.

At no time subsequent to the Revolution had the country lacked individual and organized effort against slavery. The fundamental principles of liberty had been clearly apprehended and cogently stated. Yet there had also been a steady growth, North as well as South, of industrial, social, and political interests resting on slavery. These gave rise to sentiments which, if they did not look to its extension, deprecated any immediate opposition. A large portion of the community, with strong race aversions and religious prejudices, with no vigorous sense of right, found themselves involved in the flow of events, and quietly yielded to the influences which made for the extension of slavery. They accepted the concession of the existing state, made the most of apologies, assented to the obligation of constitutional compacts, were restless under any higher or wider standards of duty, were bitterly hostile to fanaticism, and regarded present prosperity as all that the practical man could consider. This tendency, always so powerful with the masses of men, was especially prevalent after the Missouri Compromise, which accepted slavery as a permanent political fact and provided a career for it, side by side with liberty, under the national flag.

We shall not understand the denunciatory language of Garrison and those associated with him unless we remember that sound principles were becoming dormant in the popular mind, that a general sense of right was being smothered by an overtopping affirmation of constitutional obligations, and that the difficulty of the situation and the strong undertone of events were being made to cover up moral indifference. It was a case

in which the prophetic rule became, "Cry aloud and spare not."

Garrison, through *The Liberator*,—started in Boston in 1831—and in his public addresses, made moral indolence impossible. The friends of liberty, startled by his unsparing denunciations, were forced to accept or reject them. Those disposed quietly to concede the claims of slavery were thrown into an attitude of bitter hostility. The battle was on, and the sifting process began with new energy. Rewards were offered for the detection of any person circulating his paper, and still larger rewards for the arrest and conviction of the editor. In Georgetown, D. C., one circulating the journal was open to fine and imprisonment, and, failing to pay the fine, to be sold for four months into slavery. The apathy which accompanied a successful development of evil was broken up. "Nine years after the establishment of *The Liberator* there were nearly two thousand anti-slavery societies, with a membership of some two hundred thousand."[1] When conscience is going to sleep in the lap of indolence, it is not to be awakened by commonplace truths, sung as a lullaby.

§ 12. The American Anti-Slavery Society was formed in 1833, at a convention held in Philadelphia. Its constitution was one of uncompromising hostility to slavery. Its purpose was to establish anti-slavery societies and preach an evangel of liberty "in every city, town, and village in our land." The men who took part in it were possessed of an ability and energy proportioned to the undertaking. It has rarely happened that a discussion so purely ethical has been carried on for so long a time over so extended a territory with so little interruption.

[1] *Rise and Fall of the Slave Power in America*, vol. i., p. 186.

The opposition aroused was proportioned to the character and vigor of the attack. Mobs gathered in many cities. Denunciation and violence took the place of argument. The words of our Lord were once more illustrated, "I came not to bring peace but a sword." Principles, as an immediate guide to human actions, were accepted and rejected on all sides. The religious sentiment of the country was no more true to itself than the political sentiment. Neither of them had fathomed their faith to its deepest spirit, and neither of them was prepared for a self-denying application of its precepts. Hence the ethical conflict disturbed and divided the churches with the same vigor with which it stirred up the community. It was truly a great period in the history of the nation as forcing men back upon fundamental convictions, and making them thoroughly aware of the law of righteousness in its exacting character. If this strife seemed to sow, and did sow, national division, it helped to hold in check a movement which would have ultimately divided the nation. It precipitated the conflict for liberty, and rallied the forces which carried it successfully through.

The personal power drawn out by the struggle was of the very best. There were many to lead and many to be led. Every community had its prophet and became fruitful of heroic purpose. Men of the highest, finest, most unselfish impulses stirred the people, when little open action was possible and the political outlook was obscure, to deliberation, petition, censure. The spirit of martyrdom was present in the stern soul of Garrison, and in the more gentle mind of Lovejoy. It took possession of large numbers who were willing to proclaim liberty and assist the fugitive slave at all personal hazard. John Brown was the apotheosis of this temper, in its

least rational, but in its most unhesitating, form—a marvellous example of the productive power of a noble mind even when it has shaken off contemptuously the conventional opinions which should clothe us as a garment.

The best oratorical, and the best poetical, ability were enlisted in the cause. Whittier brought to the defence of freedom a spirit at once stern and tender. Lowell scourged the defenders of slavery with sarcasm and ridicule. Phillips stirred even a reluctant public with speeches skilful, winning, and bold. Parker aroused the moral sense by appeals direct and incontrovertible. Yet these men were simply leaders among men in no way inferior to them in temper, and not far behind them in power.

In due time the movement begot statesmen of the same large mould: Adams, Giddings, Sumner, Seward. Not often in the history of any nation have the ethical convictions of the people been brought so persistently to the solution of a great problem. So profound an effort greatly stimulated the national mind. The discussion lost its local bearings. A horizontal cleavage came in to modify the vertical cleavage that divided the North and the South. A fresh sense of liberty was called out, and citizens proclaimed it throughout the land. A spirit of self-devotion was awakened in behalf of the public welfare, conceived in a reformatory and ideal way. When the final struggle actually came, we were able, by virtue of this preliminary discipline, to escape two dangers—the danger of clinging to a policy of concession and compromise, and the danger of discouragement as the conflict became fierce.

§ 13. Lincoln, to whom the country owed so much in the issue, was in a very complete way the product of the

discussion in which so many complex social tendencies were brought face to face. His courage was characterized by hesitancy. He was afraid of adopting a policy which had not come to express the heart of the nation. He was a popular leader in the sense that he kept close to the people and wished to feel them each instant behind him. He was not impatient of delay. He was not making for a distant port, but evading danger just under his keel. The anti-slavery sentiment that was generated before the war was all needed to sustain the war. It became the centre of that conviction which left us no choice but victory. Our nationality was never so strong as when we finished the struggle.

The dissension and bitterness which were inseparable from the anti-slavery crusade were relatively superficial, and passed quickly away when overmastering events took the question in hand and gave it their own irrevocable answer. No form of defeat leaves slighter wounds than one which attends the victory of a moral principle. The " lost cause " was absolutely lost, and admitted of no resurrection. The overthrow was not a personal wrong, it was not a personal triumph; it was the acceptance of a conclusion which the ethical sense of the world had placed beyond further debate. We have occasion to look back on those years in which the nation was so deeply and widely moved within itself by social ideas as a period in which we came into better possession of our doctrine of liberty, and were made ready to give it a more vigorous and invigorating development. The soil was plowed and harrowed, but in reference to more lusty growth. We found the honey in the carcass of the lion.

§ 14. The political events which went with this period of discussion were not of the same moment as those to

which it gave rise, but they helped to keep the public in ferment, and to disclose the exacting character of slavery as a social institution. We as a nation could not shape a foreign policy in harmony with a free government. We could not be hearty in the suppression of the slave trade. We were on bad terms with Spain and with England because of escaped slaves. We were forced to take a regressive attitude whenever the question of slavery came into the foreground.

The *Creole*, in 1841, sailing from Hampton, Virginia, to New Orleans with one hundred and thirty-six slaves, was captured by them and carried into Nassau. They thus became free under English law. This gave rise to warm debate in the Senate, and to expostulation on the part of Daniel Webster, Secretary of State. Joshua Giddings introduced resolutions into the House, setting forth the local character of slavery. He was censured by the House, resigned, and was returned by his constituents.

Just previously, in 1839, had occurred the "*Amistad* case." Certain negroes had been bought in Cuba of a Portuguese slaver, in violation of the law of Spain. They were being transferred from one port in Cuba to another on board the *Amistad*. They rose against the crew, captured the vessel, and ordered that it should sail to Africa. In place of this, it was furtively brought northward, and was taken by a brig in the service of the United States into New London. The Spanish ambassador demanded the return of the alleged slaves. The Secretary of State under Mr. Van Buren was ready to grant the claim, and made preparation to return the negroes at the public charge. An anti-slavery committee was formed to protect them in their rights. A suit was brought in the District Court. The decision was in favor of liberty. The case was

carried up to the Circuit Court, and later to the Supreme Court. The judgment of the lower court was affirmed. John Quincy Adams made an aggressive and telling argument before the Supreme Court. The concessive temper of the Executive was thwarted only by the persistency of the anti-slavery sentiment.

§ 15. The nature of the contention became yearly more evident. No peaceful and final compromise was possible between liberty and slavery. Slavery was too difficult of maintenance, too much opposed to the general flow of thought and of events, to allow any other attitude in its adherents than that of determined resistance. So obvious a fact would have disclosed itself at an earlier period had not a strong race prejudice added itself to weighty interests. The guaranties of the Constitution were found in the way of slavery. The right to petition the Government for the redress of grievances was among these emphasized safeguards. It was employed at once against slavery. Its continued, though ineffectual, use became very annoying to the South. During Mr. Adams's long service in the House, he was the favorite avenue of introducing anti-slavery petitions. In 1835, a petition was introduced by Mr. Adams purporting to come from slaves. His action provoked savage attack, and was defended with his usual insight and intrepidity. The debate issued in the passage of the following resolution: "That all petitions, memorials, and papers touching the abolition of slavery or the buying or selling or transferring slaves in any State or District or Territory of the United States, be laid on the table without being debated, printed, read, or referred, and that no action be taken thereon."

In 1842, Mr. Adams presented a petition from citizens

of Haverhill, praying for a peaceful dissolution of the Union. A resolution of censure was moved. This gave occasion to one of the most powerful and incisive of Mr. Adams's speeches. He so well understood the principles of the Government, and was so utterly fearless in their defence, that no attack upon him prevailed. Rarely has a cause been favored with so able and so courageous a defender as John Quincy Adams in the House of Representatives. For a long period he met and repelled the hostility of pro-slavery sentiment. Our party politics no longer admit of such personal independence.

Two other guaranties of the Constitution were freedom of speech and freedom of the press. The attitude in Congress, the censure bestowed on its members for freedom of speech, mob violence in the North, repressive statutes in the South, set at naught this birthright of liberty. The freedom of the press suffered direct attack from which it narrowly escaped. Jackson, in his Message to Congress, in 1835, drew attention to the danger arising from "inflammatory" matter circulated through the mails. A bill was reported in accordance with the message, prohibiting, under severe penalties, the dissemination in the several States of publications which they should pronounce incendiary. It failed in the Senate by the casting vote of the President.

During the years which separated the passage of the Missouri Compromise from the annexation of Texas, both the moral and the political character of slavery were more and more disclosed as inconsistent with free institutions, both with the principles on which they rest and with their administration. No compromise was of avail, because new points of collision were constantly arising; the controversy extended to the entire temper of the social life.

§ 16. The unexpected and the unbearable ways in which these collisions arose is well illustrated in the case of colored seamen. The Constitution provides that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. Some of the Southern States, more especially South Carolina and Louisiana, were unwilling that any free black should enter their borders. Colored seamen arriving in Northern vessels were imprisoned in Charleston and in New Orleans during the stay of the vessel, and released when it sailed on condition that the jail fees were paid. If they were not paid, the negro could be sold into slavery in discharge of them. The efforts of Lincoln to redeem a negro, so sold in New Orleans, were one of his earlier experiences with slavery. Massachusetts endeavored, in 1844, to bring the law in South Carolina to the test of the Constitution. Samuel Hoar was sent to Charleston in order to arrive more accurately at the facts, to bring them before the government of the State, and, if need be, to secure the intervention of the Supreme Court of the United States in the defence of its citizens. His arrival occasioned instant commotion. The legislature adopted a series of resolutions asserting the right of the State to exclude from her territory colored persons, denying that they were citizens of the United States,—a doctrine which later found full expression in the Dred Scott decision—and requesting the governor to expel the emissary sent by Massachusetts to South Carolina. The legislature also passed an act to punish any one coming into the State to disturb, in their operation, the laws of the State pertaining to free persons of color.

Mr. Hoar was urged and threatened till it became evident that his choice lay simply between passive and active

expulsion. He chose the former, and was conducted to the vessel of embarkation. Treatment that would have been an occasion of war between independent nations was suffered without redress between States under one government. In 1845, Florida was admitted to the Union with an article in her constitution excluding free negroes from her soil.

§ 17. The third period was ushered in by an event of supreme moment in the political history of the anti-slavery struggle—the annexation of Texas, at the close of 1845. It was a signal triumph of the South, but gave rise to a series of events which brought the conflict to a conclusion. It was a victory pregnant with defeat. Annexation was of much immediate, as well as ultimate, moment. It involved us in an unjust war with Mexico; it added extensive territory and thereby gave fresh occasion for contention; it increased the arrogance of unrighteousness by immediate success.

The annexation of Texas was met with more general and determined opposition than any previous measure in the interest of slavery. It looked distinctly to the extension and perpetuity of the malign institution; it was in no way involved in the compromise of the Constitution; it could not plead any appearance of fairness in the division of territory belonging to the nation; it was simply unscrupulous power forcing its way to its own purpose. Boston and Faneuil Hall found their voice once more in behalf of liberty. The Legislature in Massachusetts, by resolution, refused to acknowledge the annexation as binding.

John P. Hale, a member of the House of Representatives from New Hampshire, who had declared against annexation, was dropped by the Democrats. He can-

vassed the State. No election was secured. Later the Whigs and Independent Democrats carried their ticket. Hale was sent first to the Legislature of the State and then to the Senate of the United States. The anti-slavery discussion began to bear political fruits. Many who had neglected it, or who had been opposed to it, as a controversy, were ready to alter their attitude when a question involving the extension of slavery was broached.

In the presidential campaign of 1840, the Liberty party was formed. It rested simply on anti-slavery principles, and its numbers were small. As the controversy widened and assumed a more definite political character, it was replaced by the Free-Soil party of 1848. This, in turn, gave way, in 1856, to the Republican party. Each subsequent movement softened and correspondingly extended the anti-slavery sentiment. It was this that was held in solution by them all. The opposition to annexation, though more general than any previous resistance, failed of its immediate purpose. The mass of the people, occupied with their own affairs, and kept contented by the general prosperity, were not ready to break with existing parties and methods. Political traditions are not cast aside by the majority of voters on less than revolutionary grounds. The Democratic party was in stolid acceptance of the existing state, and the Whigs were divided and uncertain.

The Mexican War, notwithstanding that it was forced upon Mexico and was waged between very unequal parties, soon enlisted the nation, kindled enthusiasm in a bad cause, and misled the public conscience. The Jingo element, among people and politicians, is so quickly aroused in a fight as to render the nation unable to see whether the warfare can subserve any good purpose or

yield any honor. The successes of the war diverted attention from its ulterior purposes, and from the national disgrace associated with it.

§ 18. The whole question between the North and South was raised, in an acute form, in the terms of peace and in the division of territory. The President, in 1846, asked an appropriation of two millions in order to secure a favorable settlement of boundaries in making peace with Mexico. Mr. Wilmot, of Pennsylvania, proposed as an amendment to the bill that slavery should be excluded from any territory ceded by Mexico. The amendment prevailed in the House, but a vote was not reached in the Senate. The opposition to the extension of slavery seemed more determined in connection with the Wilmot Proviso than on any former occasion. It lacked, however, real strength. Neither of the political parties was organized on the anti-slavery sentiment, and in neither of them did it command unflinching support.

At the next session of Congress, three millions were asked for. A similar amendment was proposed, and failed. The unity and energy of aggressive action were with the South, while the North, with a feeble and fluctuating hold on principles and with divided interests, offered no effective resistance. On the one side were a perfectly distinct purpose and a solid constituency; on the other, a reluctance of many kinds and shades and a divided constituency.

On February 2, 1848, a treaty of peace was made with Mexico. She ceded by this treaty, and by the Gadsden purchase made a few years later, territory nearly equal in size to the original thirteen States. The ultimate disposition of this territory in reference to slavery became at once the absorbing question. Texas, already sanction-

ing slavery, fell into the rank of slave States without discussion. The territory derived directly from Mexico had been made free, and Mexico had endeavored to secure in the treaty of peace a provision that it should remain free. Her efforts were impotent; but by the forced concession of so large a tract she threw into the camp of the enemy an apple of discord that broke it up. What she could not do by war, she did in a much more perfect manner by peace.

§ 19. In December, 1848, Mr. Root of Ohio, introduced into the House a resolution instructing the Committee on Territories to frame bills providing territorial governments for New Mexico and California, excluding slavery. The resolution was carried, all Democrats from the North but eight voting for it. The bill for the organization of California passed the House, but failed in the Senate, the fortified citadel of the slave power. The Senate strove to organize the territory acquired from Mexico without restrictions. The chief struggle occurred in connection with the organization of Oregon, in 1848. As Oregon was not a part of the fruits of the war, and was quite certain to be a free territory, the discussion was simply seizing upon an early occasion to open the conflict and to prepare the way for what was to follow.

The doctrine of equal rights between the North and the South, which appeared in the debate on the Missouri Compromise, was now carried one step farther. Calhoun insisted that Congress had no right to exclude slavery from the territories acquired by the United States. Every citizen of the United States had an indefeasible right to enter these territories, and to carry his property with him. On no other terms could an equality of rights between the States be maintained. This conclusion was

contained in the premises that slavery was recognized in the Constitution, that no limitations were put upon it, and that the equality of the States was the fundamental idea of the Federal Government. This argument was not fully met by the assertion that property in slaves was not a universally recognized right, that it owed its existence to local law, and had no existence beyond that law. The most general law in the United States, the Constitution, had tacitly accepted slavery without limitation, and could not, through Congress, withdraw that concession. When the silence and the coy phrasing of the Constitution, which were intended to maintain a good conscience and still keep the peace, were made to involve all that would have been contained in the explicit acceptance of slave and free States on the same footing, the dreadful and impossible character of the compact began to be felt. Here was another illustration of the principle that in social questions the failure to reject a wrong is its acceptance, that that which is not rooted up is left to grow. An open field is all that a social evil demands; its propagating power is in itself. Mr. Calhoun insisted, as he insists who holds a license for the sale of intoxicating drinks, that the Constitution gave its sanction to property in slaves, and cured any doubt which might seem to attach to it. The speeches made in connection with the territorial government of Oregon rendered plainer what was already plain,—that the scruples of the North had no civic footing, that the controversy between slavery and liberty admitted of no settlement till the issue was transferred to the court of ethical and social welfare. Moral considerations underlay all that the friends of freedom had to say effectually in its behalf; the neglect and the denial of these considerations left the pro-slavery argu-

ment coherent and unanswerable. The temper and the letter of the Constitution were at war with each other. The letter conceded slavery, the sentiment which accompanied its formation looked to its silent extinction. The bond was with Shylock.

The impossibility of successfully compromising a moral question lies in the fact that ethical law is a vital tissue, interlacing all social facts. Whenever we touch it affirmatively or negatively we call out some immediate or remote consequences which raise afresh the principles we have set aside. There is no possible circumscription of a moral principle. It reappears wherever we go in some fresh corollary. If we fall into error, we must go back to the beginning and correct our mistake, otherwise we carry an accumulating difficulty with us.

The establishment of a government in Oregon was a skirmish which served simply to open the real conflict. This came in disposing of the territory just won from Mexico. An event intervened which greatly aided the North. The stars in their courses took sides. The discovery of gold in California was the occasion of an instant and large emigration of a class predisposed, in an abnormal degree, to personal liberty. This settled the fate of California.

§ 20. It was not till 1850 that the final compromise was reached. Another question besides the division of territory was included in it, a new and more vigorous fugitive slave law. No one thing served more to carry the slavery controversy into all parts of the country, and to keep it at a white heat, than the escape and the return of slaves. When it came to an actual case of a slave heroically struggling for liberty, comparatively few Northern men were willing to aid in the capture, and

many found the appeal for assistance irresistible. During the years which immediately preceded the compromise of 1850, the number of slaves escaping to Canada had greatly increased, and organized efforts were made to aid them. This was a contention, not for abstract principles or political rights, but for human beings in the active pursuit of liberty, and it called out a corresponding devotion. This part of the yoke which the North, in uniting with the South, had agreed to carry, was always chafing and now became intolerable. The South, in consistency with an aggressive attitude which after all resolved itself into self-defence, was disposed to insist on a more vigorous enforcement of the law. Yet it was an effort fitted to inflame opposition and defeat itself.

The contest by which the newly acquired territory was to be settled in its destination became intense. Those elected on a Free-Soil ticket began to appear in both branches of Congress, and to give fearless expression to the doctrines of liberty. It had become less easy for Northern representatives either to evade the conflict or to juggle with its underlying principles. On the other hand, the South had annexed Texas, waged the Mexican War and secured its fruits in large acquisitions of territory. It was made bold by success, and found no room for repentance or hesitancy. As the North became resistful the South became violent. Its claims were rested upon the ground of fulfilment of promises and equality of rights under the Constitution. The North was constantly put to disadvantage by the fact that its position depended for justification on profound moral principles, which it was assumed would ultimately prevail, but which had been sacrificed in the Constitution, and constantly ruled out of order in discussion. The presumptions went

for nothing, while the specific concessions of the Constitution and their immediate implications were always at hand. Setting aside ethical right, and resting alone on guaranteed civil rights, the South was strong. A footing had been distinctly given to it, and no restrictions had been laid on the future. Equality of opportunity between the States was the postulate of the Constitution. The conflict involved the safety of the Union because it involved its destination, and the people were not agreed as to that ultimate form of the national life.

§ 21. Henry Clay brought forward the compromise measures of 1850. Though he was not able to secure their passage as one complete scheme, they were adopted singly with some modifications, and became, for a brief period, not the ground of reconciliation, but of a partially suspended strife. Texas was reserved for the formation of slave States, and the boundary between it and New Mexico was settled by a payment to Texas. California was admitted as a free State, New Mexico and Utah were established as territories with no restriction on slavery. A more vigorous fugitive slave law was passed. The slave-trade in the District of Columbia was prohibited.

The concessions to the North in this compromise were slight, and those to the South were such as to renew and extend the conflict. The new fugitive slave law provided that slaves were to be surrendered on claim without judicial procedure other than that provided in the law. The claims were to be heard before a commissioner appointed for that purpose. A fee of $10 was allowed if the alleged slave was surrendered, and of $5 if he was dismissed. Persons making arrests of slaves were authorized to summon the aid of bystanders. The law cast no protection about the colored population of the North, and looked

simply to the ease of the master in recovering his property. The new law was accompanied with new activity in its enforcement; and with new resistance. Cases were constantly occurring which stirred the popular mind profoundly. Those who accepted the compromise, and were anxious to see the reconciliation it proposed secured, were pledged to the law, and strove, though in vain, to quiet the public mind. No trimmers had ever a more distasteful and impossible task assigned them. States refused the use of their jails to officers in execution of the law, and the Supreme Court of Wisconsin opened a conflict of authority by pronouncing it unconstitutional. A more complete exposure of the nature of slavery could not have been devised, and this disgraceful object-lesson was carried into every State, county, and city.

Nor was the opening of New Mexico and Utah to slavery any more quieting. It encouraged the aggressive temper which had already won so much; it introduced a new principle, and put the possessions of the United States that were open to settlement in new relations to the South and the North. The territory which became the State of Kansas was most of it covered by the Missouri Compromise. The southwest corner lay in New Mexico. It was surrounded on three sides by lands either occupied by slavery or open to it. Hence, when Kansas and Nebraska were organized, the entire question of their relation to slavery was reconsidered, and resulted in leaving them as open territory, subject to its introduction. But no sooner had the Missouri Compromise been repealed and the territorial governments of Kansas and Nebraska been established, in 1854, than an effort was made to anticipate the South in the settlement of Kansas, the territory most accessible to slavery. This resulted in

a strife during the territorial history of the State which often approached civil war. It brought to the front such men as John Brown, and prepared the public mind for the larger conflict which it helped to usher in. No compromise ever did less to settle the questions involved in it, or to soothe the popular feeling concerning them. If any prophets were ever blind, it was those who enforced the compromise as a means of anticipating civil war. If any statesmanship of expediency was ever utterly refuted by the facts following after, it was the statesmanship of the political sages who dealt with this issue. It led on, amid hopeless confusion, to a disaster it in no way mitigated. While our punishment as a people was postponed by our concessions, no part of it was abated, no jot of it lost. The evils from which we have suffered so much, and still have much to suffer, were accumulated upon us in this period of propagation. We had much folly and perversity to correct, and they were corrected in a way thorough and patient.

§ 22. The results were made more pathetic from the character of those who helped to shape them. Never has the Senate of the United States contained three men of more ability, experience, and patriotism than Calhoun, Clay, and Webster. When the last compromise took form they were all old men, long honored by the nation; in this forced reconciliation they were doing their last work. Calhoun was a striking example of misdirected conscience and perverted ability. He accepted slavery and gave himself without stint or reservation to its defence. Around this false centre he developed a firm and self-consistent character. In the very month of his death, a speech he was unable to deliver was read in the Senate, full of the old undeniable—if slavery is under no

ban in the moral world—arguments and of the familiar prognostications of evil. He saw the crest of the coming wave that was to purge the land, and thought it the wave which was to destroy it. The life of John C. Calhoun was the discourse of history on the text, "Insecure moral foundations render nugatory talent, conviction, and devotion."

Few of our statesmen have been so patriotic and so popular as Henry Clay. He was a leader in the formation of the Whig party, whose purpose it was to rally the national strength and build up the common life. It arose in antagonism to that individualism, first in the State and then in the citizen, which has made our national development so slow and painful. His policy, though one of progress, was also one of prudence, patience, and conciliation. He was active in the concessions which disguised the discomfiture of South Carolina in the days of nullification. He brought the same temper to the slavery controversy, only to blight his own worthy ambitions and patch up a peace that had no abiding power. He failed by not catching the key-note of the situation, and by supposing that the nation could shake itself loose from the retributive net that had begun to fall upon it. In spite of all his sagacity and gracious sentiment, he suffered partial wreck on the rock of national duty, a most regrettable disaster in our history.

The case of Daniel Webster was decisively different from that of the other two, and with an admonition pathetic indeed, but still more instructive. In gravity of thought, dignity of expression, and forensic weight, Webster stands alone among American statesmen. His moral convictions were by no means as clear and as imperative as his intellectual ones. He had rendered great

service to the country by an adequate interpretation and earnest defence of the Constitution as a bond of national life. It is entirely possible to suppose that he felt the Union endangered by the growing bitterness of strife between its two divisions, and that he thought it the duty of a sober-minded statesman to make needful concessions, to enforce existing claims, and to patch up a peace on each new occasion. This temper characterized his public action. He ventured only on that advocacy of liberty which was consistent with existing circumstances. When, therefore, the struggle took on new violence and disclosed unusual danger, he was in no condition to confront it with principles that should rise distinctly above familiar methods and the indications of the hour. In his speech of the seventh of March he supported the compromise measures, accepted the Fugitive Slave law, and succumbed to the menace involved in the attitude of the South.

This defection, as it was felt to be, drew out the severest censure of the growing anti-slavery party. Whittier in his poem entitled *Ichabod*, put him in a pillory, suitable in its strength, in its deep spiritual indignation and regret, to the greatness of the criminal it held. Signally baffled in his legitimate ambition, he subjected himself to the suspicion of having made one more bid for the national favor. Whatever may have been the conflict of motives in his own mind, the one instructive fact is that he, in common with the great statesmen about him, utterly miscalculated the nature and the force of the facts with which he was dealing. The expediency and patriotism and practicality which led him and them to bind once more together the shattered raft and push it again into the current, were utterly at fault. In failing to apprehend

the moral forces involved in the struggle, they failed to understand and adequately to treat the struggle itself. A statesmanship of concessions and adjustments, irrespective of principles, was distinctly condemned by the results —both those which came to its ablest advocates and to the country as a whole.

§ 23. It is this fact which enables us better to comprehend the effect produced by the assertion of Lincoln at Springfield, "The Union cannot endure half slave, half free"; and the words of Seward uttered a little later at Rochester, characterizing the struggle as an "irrepressible conflict." These assertions were little more than truisms, and yet they produced the effects of a revelation, so great was the darkness into which they were flashed. They exposed the utter waste and folly of the methods of Clay and Webster, which, if they deferred the day of reckoning, also made it the more disastrous when it came. The North saw but slowly and reluctantly that a choice must be made between conflicting principles and social forms if national life was to be achieved. The South grasped the truth more quickly, but applied it unhesitatingly in behalf of their own institutions. The end of the strife was approaching when we began to see that compromises could have no assuaging force. Lincoln put this principle on the political side. Seward put it more broadly on the ethical side. The difference lay deep in the minds of the two men. Seward was a leader who awakened moral enthusiasm and gave new light to ideas. Lincoln was a leader who carefully studied the changes of popular sentiment, and moved no faster than the people were prepared to follow. He proclaimed an irreconcilable political temper, not a conflict of moral principles. What we owe to Lincoln was that timid courage

by which he held fast to the nation on the one hand, and moved with it toward liberty on the other.

§ 24. Two new lines of reasoning were distinctly developed in connection with these last stages of conflict. Douglas, who professed entire indifference to the successes or failures of slavery, reported the bill of 1854 to organize the territories of Kansas and Nebraska, the question of slavery being left to the decision of the people. Earlier, he had favored a division of territory and an extension of the line of the Missouri Compromise to the Pacific. He now accepted the choice of the people in each territory as the best expression of Democratic doctrine. Dickinson of New York had brought forward the doctrine in 1847, and Cass had favored it. It was now adopted as an ultimate solution of the difficulty and a rallying-cry of the party.

Popular sovereignty was characterized as squatter sovereignty, and gave graphic expression to that weakness of ideas and of will from which the Democratic party has so often suffered. Identifying liberty with the activity, the capricious activity, of the individual, reducing the province of government to its lowest terms, taking its ruling temper from rural and border life, this party has shown itself powerless in the presence of any great duty or new civilizing process. It has seldom been able to resist ill-advised action; but rarely to offer well-advised action. It has held an extreme individualism which cannot fail, in the end, to paralyze national growth. As civilization advances, as social interests are extended and interlocked, as they jostle and threaten each other, like vehicles in a crowded thoroughfare, in many new ways, the doctrine of individualism means confusion and anarchy. No modern community with its immense de-

mands, its subtile conditions of prosperity, health, culture, and refinement, can do anything adequately under the notion of a free appropriation by individuals of advantageous opportunities, and the submission of the public to merely personal thrift and enterprise. No better illustration of the chronic weakness of the extreme Democratic idea can be found than the relief with which the Democratic party adopted this notion of squatter sovereignty. The accidents attending on the early history of a territory were allowed to settle its destiny. The nation to which it belonged, of which it was soon to become a constituent, giving and sharing national character, was to stand idly by and allow first settlers—a class least responsible and soon to be replaced—to determine the great collective interests that were to follow after them. Counsel, statesmanship, authority, responsibility were all to be waived in the presence of a scant population, in full pursuit of its own immediate interests. Squatter sovereignty is an abdication of national life, a *reductio ad absurdum* of pure Democratic doctrine. The notion of liberty can be carried but one step farther, and each man be allowed to do what is right in his own eyes. Much the same weakness inheres in "local option." The smallest political unit in the State is left to determine public policy in a most feeble, shifting way, while the State, as a whole, is checkered over with changeable and conflicting patches of light and darkness. Methods with no strength in themselves and mutually weakening each other, methods that are sustained with difficulty when all are united in them, are accepted in helter-skelter fashion as the ultimate product of self-government. It is not strange that so long a stride toward anarchy as squatter sovereignty hastened the Civil War.

§ 25. The Civil War, when it came, came not as the fruit of any fresh circumstances. It was simply the ripening of events that had long been in progress. The formation of the Republican party, resting on the principle of no further concession to slavery, brought about, on the occasion of its first national victory, an inevitable collision.

The second notable advance of ideas, looking to a doctrine of reconciliation, was offered by a decision of the Supreme Court. The Dred Scott case—Dred Scott *vs.* Sandford, 19 *Howard*, 393—was brought in 1854, decided in 1856, and published in 1857. The decision is one of the most voluminous and labored of those proceeding from that great Court. It extends over 240 pages. It was withheld till the presidential election was over, and launched on the flood of the Democratic victory that brought Buchanan into office. It was intended to bring the slavery controversy to an end, and to establish slavery as a national institution on the firmest judicial basis. This the decision would have accomplished if it had met with the acceptance which has usually come to principles announced by the Supreme Court. It was thorough-going and left no room for evasions or compromises. As compared with popular sovereignty, it was final, and took the entire question out of politics, a thing so devoutly longed for when a moral principle begins to harass the political gamester. And yet it utterly failed in its purpose. It danced about a brief hour on the angry waves, adding one more element of confusion, and then disappeared forever.

Dred Scott, a slave in Missouri, had been taken by his master into Illinois, and later to Fort Snelling in Minnesota, then a territory. After a residence of a considerable period in these places the owner returned to Missouri.

He left, at his death, Scott and his children—one of them born in freedom—as slaves. Scott sued Sandford, a resident of New York and the executor of the estate, for his liberty. The Supreme Court of Missouri decided against the claim. A suit was then brought in the Circuit Court of the United States, and carried thence to the Supreme Court. The first question raised was whether Scott had a right to sue; whether he was a citizen of the United States. This question was considered at much length by Chief-Justice Taney in giving the decision of the court, and was decided in the negative. Six judges concurred with him in the general conclusion, and two, Justices Curtis and McLean, dissented.

The gist of the argument was expressed in the words which gave a great shock to the public mind, that the black man was possessed of no rights which the white man was bound to respect. The decision was a thorough and exhaustive effort to divest the black man of all civil rights and reduce him to the level of an animal, over which property claims have unimpeded sway. This was the logical conclusion of the growing claims of slave-holders, and, if accepted, would have made slavery an institution commensurate with American soil. The right of the master would have been, in American jurisprudence, a common-law right, enforced in all courts. The argument looked to a final settlement of the claims of Scott, and all kindred claims, under American law, and was none too elaborate for so sweeping a purpose.

The Court held that negroes were not recognized by the States as citizens at the time of the formation of the Constitution; that the only status which came under the consideration of the Constitution and was assigned them in it was that of slaves; that no change of public opinion

since that time was of moment as affecting this question; that no State, by subsequent legislation, could make a negro a citizen of the United States, or entitle him to the rights of a citizen.

Chief-Justice Taney reviewed at great length the various ways in which civil rights had been denied to negroes or had been disregarded in the Northern States and by civilized nations, and deduced from this historic inquiry, this prolonged record of injustice, the principle, inductively established, that the negro had never gained any claims to civil rights; that he stood in the government of the United States as one bereft of the protection of law. The instances adduced in support of this view were wide, various, and numerous, sufficiently so to have established any principle that commended itself to the moral sense and to sound reason. If, like the conflicting principle enunciated by Lord Mansfield, that English soil makes free men, it had looked toward progress, it would have found inevitable acceptance. If Taney had pushed his opinion down the current of ethical events instead of up that current, it would not have returned so quickly upon him as an empty enumeration of injuries. To be sure, as shown by Curtis, important cases, wholly in the opposite direction, were neglected in the presentation of the Court, but no principle of law is established by virtue of absolute conformity to it in previous action. This would imply that it was now, and always had been, an accepted conclusion. The acceptance expresses the fact that the law, as now declared, has been slowly emerging from many cases; that it is consonant with existing conditions, and holds in it the germ of civil growth and social strength. Action which comes under the suspicion of injustice does not make or support a

precedent. Taney reasoned from wrong and immorality as he might have wisely reasoned about rights respected and moral relations established; he made a great principle of law rest simply on a numerical induction of cases. A legal principle is always more than this. It is an address to the sense of right as an harmonizing force in human conduct. There is present an ideal and purified social relation to which the conclusion announced conforms. The deepest failure of the opinion lay not in the insufficiency of the cases which supported it, but in the unsoundness of the underlying social principle.

The second leading point, also discussed at length, was the right of Congress to exclude slavery from the territories of the United States acquired since the adoption of the Constitution. This discussion has been regarded as *obiter dictum*, since, by the first point, the suit was dismissed as beyond the jurisdiction of the Court. It was intended, however, to subserve a very important political purpose. Taney claimed the right of the superior court to fully present principles involved in the action of the lower court, even though that action had exceeded its jurisdiction. Thus a political doctrine gained the color of a judicial decision in the affirmation that Congress could not exclude slavery from territory acquired by the States in common. Whatever agreements had been made in reference to territory at the time of the adoption of the Constitution did not hold in connection with possessions since secured at the public expense. These belonged to all in common; came under the Constitution, which recognized slavery and put all the States of the Union on the same footing. It did not belong to Congress to take from any State or States this universal right.

This decision of the Supreme Court, making the rights of the master in the slave co-extensive with other property rights, and setting aside any limitation by the United States of this ultimate claim, became the accepted creed of the propagandist of slavery. It opened the eyes of the nation to the result to which it was tending. It carried division into the Democratic party. Popular sovereignty was no longer a sufficient solution. The people themselves were losing their power to touch these fundamental rights, taken under the protection of the courts. Residence in a free State gave the slave no indefeasible liberty. The conclusion would quickly follow that it gave no liberty; that rights of the master, of this common-law character, must be everywhere guaranteed.

§ 26. Taney and his colleagues, able and astute as they were, failed at once and signally because they neglected that ethical law which runs parallel with human law, and from which human law derives its strength. The entire slavery controversy is a disproof of the assertion, so early made in the discussion, that the moral character of the institution had nothing to do with its legal bearings. The moral element proved itself inseparable from the economic, social, and civil elements involved in it, and baffled us constantly in every effort to divide them. The two parts of the nation, North and South, were of one blood, one language, and one faith. Economic ties existed between them that long resisted the growing strain, and yet we came near being rent asunder and sent forth in two hostile lines of development by a question of social ethics. The war was one of institutions. There was no strife between the North and the South other than that which grew out of slavery. The North shared, and more than shared, the aversion of

the South for the negro. The difference in race reduced sympathy to its lowest terms, and made the question an abstract question of slavery simply. It was this which was decided by the war, the ethical relation of man to man.

Slavery had reached its climax of power at the breaking out of the rebellion. Slaves bore a large price. The domestic slave-trade was in full flow. Efforts were being made to resume the foreign trade. Whatever strength the institution could develop was present. The war was a deadly one, fought to a final issue. It did not end till all power of resistance was gone. Free labor and slave labor settled their respective power as social builders on innumerable battle-fields, and left no opportunity of renewing the struggle or recovering the ground that had been lost. The advantages which accrue from slavery—and these advantages are very considerable when taken in connection with war—and the losses and gains of liberty were tested, and a final verdict given in favor of liberty. This finality of the bitter struggle was its redeeming feature. It did thoroughly what it did, and left the nation free to recover unity and strength along new lines of development. What was affirmed was an ethical truth which the world had long been on the point of accepting, and which will never again be held in doubt.

CHAPTER IV

Reconstruction and Nationality

§ 1. THE years which immediately followed the war were not years fruitful in a growth of national temper. This arose partly because of the bitterness and extreme destitution left by the war, partly because of the mistakes of reconstruction, and partly because of the unavoidable evils incident to so violent and sudden a social change. In shaking off slavery, we could not wholly shake off the evils which were inherent in it. It has been a very slow and painful process for two races, of such diverse capacity and attainment, which had known each other only under the relation of slavery, to establish workable and bearable terms of liberty; and this the more because the poverty of the South left it querulous and with few occupations that could absorb and direct labor. Many mistakes and some misanthropy may readily be conceded to these trying circumstances. A growing industrial prosperity now begins to give occasion for more diversity of service and to unite whites and blacks in production. It also promotes a concord of sentiment between the North and the South; industry, diffused by liberty through all classes, resumes its natural binding power.

Not only the victory itself, but the long, hard struggle which preceded it, tended strongly to give new force to national ties. The preservation of the nation had been a supreme idea for a series of years. Every local interest

and feeling had given way before it. The power of the General Government had been called out to the full and been increased beyond all precedent. Great armies, large expenditures, high positions, heavy taxation had become familiar to the public. Congress and the country had ceased to hesitate at any measure which seemed to lie in the line of a successful prosecution of the war. The nation loomed large, and cast into its shadow personal and local disaster. The Constitution was used with the freedom incident to a revolutionary exigency.

§ 2. This bold temper was shown in the Legal-Tender Act. Adequate and immediate funds were a supreme necessity. The demand was sudden, and far transcended anything for which our history prepared us. It was met, in part, by the issue of greenbacks, and by making them legal tender. No right looking to such a result had been conferred by the Constitution. The right to issue bills of credit had been withheld from the States; and when, in the convention which framed the Constitution, a concession of the right to the General Government had been proposed, the proposition had been rejected. Congress affirmed it and exercised it as a right involved in the larger right to provide for the common defence. The implied rights grew as the urgency grew under primary ones. To Congress the issue of these bills of credit seemed the only immediate and certain way of securing the needed funds. If there was such a necessity, Congress was certainly right in making the supreme idea supreme, in letting the public safety carry with it the means requisite to the end. To sacrifice the Constitution itself to a critical and tender construction of its provisions would have been self-destruction. Congress claimed and exercised a power which it thought essential to self-

preservation. If it fell into error, it was an error of judgment as to the wisdom and urgency of the measure. The haste, confusion, and pressure of wants gave occasion to misjudgment. We can hardly pronounce a measure constitutional or unconstitutional as we deem it wise or unwise. This has been an evil in our government: that it has led us to put in the foreground the question of constitutionality when we might better have given that position to the question of wisdom. In this case, Congress laid hold of a doubtful right and exercised it in an unwise way, but did it under a purpose so supreme as to purge the act of its taint.

The Supreme Court sanctioned this issue with reluctance and piecemeal. It was decided, in the case of Hepburn *vs.* Griswold, 8 *Wallace*, 603, that Congress could not make Treasury notes legal tender for debts contracted before the passage of the act. The decision was given in 1869, and was made five to three. Chief-Justice Chase refused to sustain an act which he had recommended as Secretary of the Treasury. If he was right in this later judgment, he must have ceased to accept self-preservation as a supreme law.

In the case of Parker *vs.* Davis, 12 *Wallace*, 457, the Court decided, five to four, that Congress had the power, in a season of exigency, to make Treasury notes legal tender. In the case of Juillard *vs.* Greenman, 110 *U. S.*, 421, the power of Congress was fully sustained as one that might be exercised in peace or in war. This was the only logical conclusion. Congress can hardly be conceded a power which it is at liberty to exercise only in an emergency. Congress itself would judge that emergency, and so extend its power at its own pleasure. If the Supreme Court were left to determine whether the exigency was

sufficient to justify the use of the power, it would thereby take upon itself the task of determining the legislation fitted to a given political occasion, and in so doing substitute its action for the action of the legislature. We must endure the mistakes of legislatures and of courts alike. They cannot directly correct each other. Undoubtedly the decisions of constitutionality and unconstitutionality made by the Supreme Court will be affected somewhat by its sense of the necessity and wisdom of the action under discussion; but its renderings of the law must be explicit and final, not conditional. It cannot undertake to criticise the manner in which the legislature acted, but must simply decide whether that action was within the scope of its power.

§ 3. The immediate and urgent questions of reconstruction—the restoring of the subdued States to the Union and the terms on which it should take place—revived the old discussion of the position held by the States in the Union. Did the States in rebellion still retain a political integrity, an indefeasible right, not affected by their action, and open to resumption at pleasure? The logic of events now prevailed with comparative ease. The war disproved the doctrine of secession, and the exigency of restoration forbade the doctrine of a right to a free return. Congress held that the States which had suffered defeat were conquered territory, subject to such restrictions as the general welfare required, and to be restored to the Union only on terms which would be likely to prevent any recurrence of strife. The safety of the nation admitted of no other doctrine than that it itself, as expressed in the General Government, must settle the terms of peace; that it conquered the right to make peace. And on this doctrine reconstruction took place.

Yet the Supreme Court did not altogether accede to this opinion. In the case of Texas *vs.* White, *7 Wallace*, 700, the claims of Texas, prior to reconstruction, to certain United States bonds were conceded. Chief-Justice Chase, in giving the decision, said: "The Constitution in all its provisions looks to an indestructible union composed of indestructible States." This opinion regarded the form of things—a form that had been broken up and had passed away—rather than the substance of things. In this decision, and in the legal-tender cases, Chase showed a remarkable separation between his theoretical and his practical outlook. As Secretary of the Treasury he hesitated at nothing that was needful for success; as Chief-Justice he felt constrained to condemn and undo his own most admirable action. If this view had prevailed, it would have been impossible, having fought the war to an end, to have harvested its results in a permanent peace. Justice Miller, Swayne, and Grier dissented. It was the opinion of Chief-Justice Chase that Texas continued to be a State of the Union notwithstanding her rebellion. This view was the faint vanishing shadow, in a strangely distorted form, of the old doctrine of State rights. The State retained its separate identity in the Union in spite of the General Government and in spite of itself. Justice Grier, in dissenting, affirmed, with more practical insight, that the question before them was "a question of facts only. Politically, Texas was not a State of the Union." He thus left the entire field of reconstruction open to the action of Congress. The theoretical view—always so strong with the judicial mind—prevailed with the majority, and the practical view found expression in the minority.

§ 4. The three amendments to the Constitution, the

Thirteenth, Fourteenth, and Fifteenth, which greatly widened the Constitution in its temper, and under which reconstruction took place, gave occasion, in their application, to a redefining of the relation of the States to the General Government. For a time the local government of the States threatened to be greatly restricted by them. These amendments, especially the first clause of the Fourteenth Amendment, were capable of a rendering which would much abridge the action of the States.

"The persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law."

These amendments were intended to restrict the power of the States in reference to the negro, and yet could be so applied as to abridge it in reference to all citizens. The restrictions might be given a general, rather than a specific character. The clause just referred to defines a citizen of the United States, and then proceeds to protect him in his rights. It may seem strange that the question of citizenship had been left so long in obscurity, and that the laws of naturalization laid down by the United States, and which, from the nature of the case, should have been exclusive, were not made to shut out a great variety of lax laws on the part of the States. This arose from the fact that the States at the time of the adoption of the Constitution were in possession of the field, and did not contemplate a surrender of their own loose and variable methods.

One might become a citizen of a State; be allowed to vote in its elections, and, as associated therewith, in the election of United States officers, and yet have no claims to citizenship in the United States. The question of citizenship in the State and in the United States had been left to assume an ill-defined and changeable form. The great number of immigrants, and the difficulty of conceding them political rights in the States without at the same time conceding them similar rights in the United States,—the qualifications of electors of members of the House of Representatives being defined by the Constitution as " the qualifications requisite for the most numerous branch of the State Legislature "—and the still more important fact that the negro might be granted citizenship in one State and refused it in another, and so give occasion for strife under the clause of the Constitution which affirms, " The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" these close and complex relations of the inhabitants of the several States to each other and to the United States rendered it especially desirable that citizenship should receive an authoritative and uniform definition. The several States would thus lose the power either to confer or withhold citizenship in the United States, or to restrict the rights of citizens under the Constitution. The definition, however, as given in the Fourteenth Amendment, still leaves the question at loose ends as far as naturalization is concerned. The United States has not made its own laws on this subject exclusive and final.

That it should do this is the more necessary as general and local elections are not ordered separately.

§ 5. Distinct citizenship in distinct political organizations—those of the States and that of the United States—

presented an anomalous condition of affairs, that called for a clear and final adjustment. Otherwise the country was left to the confusion expressed in citizens of one State being excluded from another State; in citizens of States exercising political rights in the United States without citizenship therein; and in citizens of the United States abridged in their rights by a refusal of the States to recognize them as citizens.

Various solutions more or less apt might have been given to this problem. There might have been a double and distinct citizenship in the State and in the United States, each on its own terms and with its own rights. This arrangement would have constrained the General Government to confine its political and judicial privileges to its own citizens, and to leave any exceptional rights granted by one State as contrasted with another State to be confined wholly to its own territory.

It might have been left to the States to define citizenship. In that case we should have had the confusion of diverse definitions, and so have missed uniformity of rights in the United States. Citizens of the United States would be admitted to its privileges easily or wholly excluded according to the policy of the particular State, the special door at which they applied. The different treatment of the negro in the several States rendered this method especially obnoxious.

A third device might have been an exclusive definition of citizenship by the General Government, carrying with it the same rights everywhere. This would have greatly limited the power of the States, taking from them a leading expression of their sovereign character. This is the more manifest when we take into consideration the institution of slavery. Under such a settlement slavery

would have soon become either universal or impossible. The diversity of social institutions between the free States and the slave States was made possible by separate principles of citizenship, separate laws which they were at liberty to establish and enforce. The Constitution involved more unity of sentiment and civil law between the States than really existed, and than it dared to establish, or would have been able to establish. In the controversy between Massachusetts and South Carolina under the clause, "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States," Massachusetts was technically, constitutionally, right; but if South Carolina had conceded the claim she would have lost her power to shape her own institutions. A community, a comity, of civil rights was impossible between States so diverse in their method of conferring citizenship as were Massachusetts and South Carolina. South Carolina could not allow Massachusetts to give a negro all the rights of a citizen within her borders when she herself had denied him these rights for reasons which she deemed fundamental in her social polity.

Much the same excessive supposition of unity in the Constitution is seen in the manner in which it settles the elective franchise. There is no effort to separate the State elections and the elections of the United States; they cannot, under the Constitution, be separated. The electors of representatives, of senators, and of the president of the United States are all ultimately defined by the States. One having all the privileges of a citizen of the United States in one portion of its territory might, in another portion, be held as a slave. The United States was thus robbed of all uniformity, of all policy, in conferring and withholding its own privileges. The root

relation out of which the nation grows is that of citizenship, and no people can go far in securing nationality till this rests on a uniform and satisfactory basis. At the time of the formation of the Constitution this necessity was not felt; nor, if it had been felt, would it have been possible to secure the desired result.

A fourth method possible was a definition of citizenship, single and exclusive, by the United States conferring two sets of rights, one in the State and one in the United States. This is what our present system of unity, with divided authority, demands, and what we have, subject to the modifications which the participation of the States in naturalization and the variety of the conditions in them of suffrage, bring to it. Two things are necessary to make the method complete: the withdrawal of the right to determine citizenship from the States, and the establishment of uniform conditions of suffrage in the States. The nation, and the nation alone, should settle citizenship in its entire territory. As the Constitution deals with citizens, defines and guarantees their rights in the United States, it, and it alone, should define who they are. It is fit also that the nation and not the State should confer political rights in the government of the United States. The Thirteenth, Fourteenth, and Fifteenth Amendments go a long way toward this result; they do not reach it. The confusion here gave occasion to distinct development in the States, and then to the bitterness of the slavery controversy. There was no common ground of citizenship, and so of civil and political rights between them. The North and the South reasoned from conflicting social institutions, leading to conflicting rights, and neither could yield to the other without a radical social revolution.

§ 6. The Fourteenth Amendment raised the entire question of the privileges and immunities which attach to citizenship in the United States and in the States respectively. It would seem to have been more fitting that the amendment itself should have explicitly recognized the distinct privileges which arise under the general and the local government, and have given some hint of their nature. This was not done, because the attention of Congress and of the country was directed primarily, not to this familiar but undefined division of functions between the two authorities, but to the protection which the United States must cast at once over its colored citizens. It felt the need of removing this class from under the hitherto undisputed control of the States. Local government was to be abridged in this direction. This was the absorbing idea, and served to hide the more remote consequences which might follow from it. Moreover, if the need of drawing the distinction between these rights had been felt and attempted, the effort would have involved great difficulty. It is impossible to give a succinct and adequate statement of the privileges and immunities we enjoy as citizens of the United States and those we enjoy as citizens of a State. An inadequate separation might have occasioned more perplexity than no separation. When a right arises it is not ordinarily difficult to determine to which of the two categories it belongs. It would be very difficult to express in any but the most general terms all the privileges and immunities which may arise under these two sources of law. Indeed the distinction itself is not quite stable. The intention of the Fourteenth Amendment was to alter the division, and it did alter it. How far it had altered it came before the courts for determination. The taking

up of a new line of activity, like that expressed in the Interstate Commerce Act, modifies the relations of the citizen to the State and the United States in the pursuit of his rights. Law may frequently have that effect.

§ 7. The entire question of the rights which the General Government had taken under its own administration by the amendments came up in the Slaughter-House cases, 16 *Wallace*, 36, and received a most fortunate solution. The Legislature of Louisiana incorporated The Crescent City Live-Stock Landing and Slaughter-House Company, and gave it exclusive rights extending over 1154 square miles for twenty-five years. The ostensible justification was the police power of the State. The law was attacked as greatly transcending this purpose, as creating a monopoly, and putting unjust restrictions on those engaged in this line of business. The Supreme Court of Louisiana sustained the law. The case was brought before the Supreme Court of the United States, and argued under the Thirteenth and Fourteenth Amendments. It was urged, under the Thirteenth Amendment, that the law created a servitude; and under the Fourteenth Amendment, that it abridged the privileges and immunities of citizens of the United States. This last was the controlling consideration. Justice Miller gave the decision of the Court sustaining the law. The Court was divided five to four. The judgment rested not on the fitness of the law in itself, but on the right of the State to regulate its own concerns. The law lay within the prerogative of the State. This prerogative the Fourteenth Amendment did not intend to take away, but to restrict in certain particulars. The amendment must be interpreted in view of the special circumstances which

called it out and the protection it was intended to extend. It was designed to shield the colored race from any laws bearing distinctively on them as a people. It was enacted in order to secure an equality of privileges between blacks and whites. It was not the purpose of the amendment to abridge the powers of the States in any other particular. The incorporating act of the Legislature of Louisiana made no discrimination between negroes and other citizens. Its faults, if faults there were, bore equally on all. The law lay within the province of the State. The Legislature of the State passed the law, the Supreme Court of the State approved the law, and its merits and demerits were strictly a local affair. No right of any person, as a citizen of the United States, was involved. The rights concerned were only those incident to citizenship in the State, and must find protection, if protection was needed, by the State. If correction was allowed to enter from the Supreme Court of the United States, the boundaries between the subordinate and the superior government would be broken down, and all questions of constitutional justice find their way to the tribunals of the United States.

§ 8. Justice Field gave a dissenting opinion, concurred in by Chief-Justice Chase and by Justice Swayne. Justice Bradley, in still further enforcing the opinion of Justice Field, laid down the assertion as a leading position that a citizen of the United States had the right to prosecute any employment he might choose to follow, subject to the reasonable regulation of law. This proposition disregards the right of the State to any policy of its own, to any independent definition of rights. Enforced by the Supreme Court of the United States, it would have made that tribunal the ultimate judge of the rights of citizen-

ship. There would have been but one citizenship, that of the United States.

In keeping with this dissenting opinion, it was thought that this Fourteenth Amendment opened the door for many questions which could now be laid before the Supreme Court of the United States. Thus Mrs. Bradwell endeavored to secure the right to practise law in Illinois regardless of the decisions of the courts of that State: Bradwell *vs.* Illinois, 16 *Wallace*, 130. The refusal of the State was regarded as abridging the privileges and immunities of a citizen of the United States.

In 1891, Judge Hammond, in the Circuit Court of Tennessee, dismissed the complaint of a Seventh-day Baptist who had been imprisoned under the laws of Tennessee for plowing on Sunday.

On the other hand, a statute denying blacks the right to sit on a jury, was pronounced unconstitutional—a violation of the Fourteenth Amendment: Strander *vs.* West Virginia, 100 *U. S.*, 303.

It is not easy to overestimate the importance of the decision in the Slaughter-House cases as preserving a peculiar and most valuable feature in our government. It goes far to win for Justice Miller a position only second to that of Marshall in the apprehension of the true nature of our Constitution, and of the office of the Supreme Court under it. It is surprising that Chief-Justice Chase, who had stood so staunchly for the inviolable character of the State, and Justice Field, who expressed to the last his unqualified dissent from the right of the General Government to issue legal-tender notes, should have both favored the complete surrender of the State to the United States in the terms of its internal policy. Such an inconsistency of opinion illustrates the fact that no techni-

cal acumen can make a great judge, but may often stand in the way of such a result. A clear conception of the nature of the government, of its true line of development, and of the ultimate bearing of any given question on these two points is of far more moment than an ingenious unfolding of legal ideas and constitutional language.

The decision of the Court and the opinion of Justice Miller righted the vessel at once. The attention was restored to the true constitutional balance, which it is now comparatively easy to maintain. The signal failure of the States in one instance to deal justly with the primitive rights of citizens was not allowed to wholly sweep away their jurisdiction in this class of cases. Especially were the police powers of the State to be carefully guarded: Barber *vs.* Connolly, 113 *U. S.*, 27; Hennington *vs.* Georgia, 163 *U. S.*, 299.

§ 9. An act of March 1, 1875, aimed to secure equal accommodations in cars, inns, public places, for blacks and whites. It was held by the Supreme Court to be unconstitutional on the ground that Congress had no right to take the initiative; to invade, by an independent act, the realm of the State. Its right is secondary to that of the State, and lies in correction of any unequal laws or regulations which may be made by the State. The whole field of safety and good order rests with the State, that of equality between special classes of citizens rests with the General Government. The General Government cannot correct deficiencies in the legislation of the State, but can restrain legislation which denies to any person the equal protection of the law when that inequality rests on race or color or previous condition of servitude: Civil Rights cases, 109 *U. S.*, 3.

For a like reason the memorial of the Legislature of

Massachusetts, in 1893, addressed to Congress in reference to establishing uniform rules regulating the employment of women, had no constitutional standing. We cannot possess the advantages of that extended local government which falls to the States without suffering its disadvantages. Much defective, unwise, and undesirably diversified legislation must be endured as the product of ignorance or caprice or neglect in the several States. We must more frequently fight the battles of reform in each of these civil communities, subject to the losses and gains of each locality, and to an endless repetition of labor. We may start a reform in a single State which could make no progress in the nation; we may find a reform which commands national attention perplexed and delayed by the resistance of a single State.

The Civil War and the reconstruction which strove to heal its wounds not only swept away the grounds of the deepest social division in the nation, they greatly strengthened the General Government by the immense activity and expenditure they involved. The previous want of balance between the States and the United States was more than corrected, and the danger became that no State or group of States would be able to hold its own against the encroachment of the national life.

CHAPTER V

Strife between Departments

§ 1. THE third struggle in the harmonious development of the national life, that between departments, has been far less serious than either of the two contentions that have now been presented. The Constitution of the United States was framed under the ruling idea of a careful separation of the three leading departments, legislative, executive, and judicial, from each other. It was expected that they would mutually restrain, as well as supplement and support, each other. This expectation has not been disappointed. The friction between the departments and their trespasses on each other have never been serious, and have soon passed away. The division between departments has helped to check the centralization of power. The interpretation of law devolves on a judicial body, not only distinct from the legislative body that enacts law, but very different from it in its traditions and immediate purposes. The legislative department is the one most able to encroach, and most likely to encroach, on other departments. The direct representative force of the legislature, the confidence created by numbers, by counsel, and by discussion; the large oversight of collective interests, the predominant purposes, the power of impeachment, which fall to it; the interest which the people take in its proceedings, all give it a weight not easily resisted when acting in concurrence with popular

sentiment. The judiciary, on the other hand, constitutes a much less conspicuous body, one with less command of public sympathy, and one not infrequently called on to modify, or wholly arrest, a law which the people have forced through the legislature. The occasions of collision are relatively frequent between these two departments, and are often accompanied, on the part of the legislature, with the sense of being baffled. A sound judiciary is at once the greatest safeguard of a free government, and its most continuous constructive agent. The harmonious development of needful powers, as well as the arrest of dangerous powers, is largely the work of the judiciary. The Supreme Court of the United States has fulfilled this double function with much energy and great freedom from mistake. The ultimate judgment of the people, however, has had occasion at times, as in the Dred Scott decision, to render void its errors.

§ 2. Under the lead of Jefferson and Randolph, who were reluctant to accept a strong government, an attack was early made on the Supreme Court. The impeachment of Justice Chase, which very fortunately failed, was an effort to hold the judges in check. Justice Chase was a man of ability, decision, and integrity. He had not been as prudent in taking part in politics as he should have been, and as the judges of the United States have uniformly been. Yet his faults were wholly of a venial character, attributable to an irascible temper. They constituted no sufficient ground of impeachment. The failure of the attack increased the strength and security of the Court.

The reduction of the number of judges when the Republican party first came into power was much more excusable. The Federalists, anticipating defeat, as one

of their last acts gave a sudden expansion to the courts of the United States, and filled the sixteen judgeships so established with their own adherents. The movement, though prompted in part by an undue fear of the Republicans, was precipitate and partisan. A natural sequence was a repeal of the act by which the new courts were established. "As they could not remove the judge from the bench they removed the bench from the judge."

§ 3. The most critical period in the relation of the legislative and judicial departments was that of the Civil War and of reconstruction. Each branch of the Government was in possession of mature strength, while there was a wide divergence in their immediate responsibilities and in their outlook on methods. Diversity of opinion was unavoidable. Congress was called on to deal at once, in an effective way, with the most critical, obscure, and urgent circumstances. There was almost nothing in the history of the nation to guide its legislature. Congress was compelled to accept responsibilities and assume powers for which there were no precedents, and of which there had been no forecast. If Congress made mistakes, it must correct them rather by pushing forward than by receding from them. Energy and decision were the cardinal virtues. Hesitancy was the worst of errors.

To the judiciary, on the other hand, fell the difficult task of reviewing the action of the legislative body, frequently long after the exigency had passed by, when the necessities of the case no longer suffered exaggeration, and the right lines of action had been revealed by the progress of events. It was their office to see not so much that the immediate task was performed, as that the Constitution suffered no strain. The judicial mind, as

contrasted with the legislative mind, is also more firmly bound to recognized methods and feels less keenly the circumstances which seem to render them inadequate. It is not surprising, therefore, that a rift should begin to appear between the two departments. The marvel is rather the degree in which harmony was preserved.

This division is well illustrated in the Legal-Tender Cases. Congress, in issuing Treasury notes and making them legal tender, acted according to its best judgment, under circumstances which admitted of no delay and amid an alarm and confusion of opinion that themselves greatly enhanced the danger. Whatever wiser policy might have been pursued, the policy adopted was so far successful that funds were provided, the immediate exigency was met, and the nation gained the time and courage which led to success and enabled it later to see and feel the costly character of the way by which it had come. If the question of the constitutionality of the issue had offered itself to the Supreme Court as a perfectly open one; if, by the action of Congress, interests of the utmost moment had not already been involved; if a change of view had not been ready to be followed by much confusion and injustice,—then, doubtless, the Supreme Court would have regarded the issue of the greenbacks as an unwarrantable extension of the power granted to Congress by the Constitution. The question actually before the Court was not one that could be decided on abstract grounds simply. A most important, extended, and complex series of facts, largely unchangeable in their results, were involved in the decision. The injuries that had accrued were in a high degree incapable of correction, and the effort to correct them would add to them a new series of wrongs. A court that should overlook or disregard such relations as

these would be unworthy of the watch and ward of the great interests committed to it and of the national trust reposed in it. The time for a purely critical view had gone by. It was now necessary to look upon the question of constitutionality as part of the broader question of national life. The Court slowly and reluctantly accepted the situation, till, in the final decision, no one but Justice Field adhered to the more formally correct, but far less practical, view. The Court wisely allowed itself to follow in the steps of Congress, on whom the pressure had rested, and whose conclusion, wise or unwise, demanded the utmost respect. This concessive opinion, well presented by Justice Miller, most fortunately prevailed in these trying experiences, when errors were inevitable, and when critical discussion and unconcessive correction would have enhanced the danger.

§ 4. The war gave occasion for an extension of executive and military authority at some new and dangerous points. The first collision with the courts arose in the case of Merryman, arrested May 21, 1861, in the State of Maryland under military authority. The writ issued by Chief-Justice Taney was disregarded, while he denied the right of the President to suspend the writ of habeas corpus.[1] The conflict occasioned perhaps less anxiety because Taney was just at the close of his services, and was regarded as one who had prejudged the main issue. This disagreement was trifling compared with that which had already occurred under the irritation of the fugitive slave law. The Supreme Court of Wisconsin had taken a prisoner from the custody of an officer of the United States, justifying the action by declaring the law under which he had suffered arrest unconstitutional. This was

[1] Miller on the *Constitution of the United States*, p. 349.

a complete inversion of the relation of the two powers to each other; Ableman *vs.* Booth, 21 *Howard*, 506.

The case which brought the question to an issue of the power of the President and of Congress to suspend the writ of habeas corpus, and to order a trial by a military commission, was that of Milligan, 4 *Wallace*, 2. Milligan was arrested in Indiana, a State not in rebellion, not invaded; a State in which the courts of the United States were in peaceable possession of their usual jurisdiction. Milligan stood in no connection with the military or the naval service. He was accused of conspiracy, tried by a military commission, and sentenced to be hung. The case was brought before the Supreme Court of the United States. The decision, five to four, was that a military commission, under the authority of the President, could not try, commit, or sentence a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor in the military service of the United States, in a State not engaged in rebellion, nor invaded, and in which the Federal courts were open. It was further affirmed, that Congress could not confer on the President the power involved in this procedure. It was this last assertion which drew forth dissent from Chase, Wayne, Swayne, and Miller.

The question turned chiefly on the right of trial by jury, defined in the Fifth Amendment: "No person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." All agreed that in the case before the Court, Congress had conferred no right for the trial of a citizen by military commission. The minority were not willing to

deny the right of Congress, as a universal proposition, to authorize such a procedure. Congress had the power to declare war, to raise and support armies, and to make rules for their regulation. Both forms of power, military and civil, were entrusted to Congress, and the minority looked on the Fifth Amendment, not as a final and fast definition of the lines to be drawn between them, but as maintaining the civil rights of the citizen, except so far as the military power, pursuing its own legitimate aim, intervened. Congress had a right, in the first instance, to determine whether the circumstances were such as to require an extension of military authority. The fact of the presence of the civil courts might not, in all cases, sufficiently define the character of the exigency. There was a legitimacy which belonged to military authority equally with civil authority, when the safety of the nation called for its exercise. The suspension of the writ of habeas corpus looked to a temporary substitution of military for civil tribunals. The writ was suspended in the presence of the courts. That was the very intent of suspension.

The doctrine outlined by the events of the war, and involved in the opinion of the four dissenting judges, was that the President might suspend, at his discretion, the writ of habeas corpus, his action being subject to the confirmation of Congress; that Congress, at its discretion, might extend or withhold confirmation; that the courts would not intervene when the military exigency was apparent. This differs from the English doctrine in not conceding absolute liberty to the legislative body. The citizen remained under the protection of the courts.

§ 5. A conflict of opinion as to reconstruction was evaded in the case of McCardle, 6 *Wallace*, 318; 7 *Wal-*

lace, 506. McCardle had been arrested by military authority for interfering with reconstruction. He was brought before the Circuit Court of Mississippi and the case carried thence to the Supreme Court. Congress held tenaciously to its right of a free hand in reconstruction. The Constitution had no instructions for such circumstances, and could not come into operation in reference to the rebellious States till they were restored to their normal relations under it. The method of the restoration was simply a question of political wisdom. Another opinion was more or less prevalent in the Supreme Court. Congress was unwilling that it should gain expression. Before the case came up for decision Congress repealed the law under which the case was carried to the higher court. Thus the occasion of a collision was avoided.

§ 6. A second conflict of departments has arisen between the President and Congress. It was apprehended at the formation of the Constitution that the power of the President would prove excessive. The facts have not confirmed this anticipation. There has been but little collision between the two departments, and Congress, in the most critical of these cases, easily held the field.

Papers, in the case of Jay's treaty, were refused by President Washington to the House of Representatives as having, in the premises, no function of criticism or right of action. The House has claimed the right, as in the case of Alaska, to act its own discretion in the case of treaties when these treaties could not be given effect without legislation. Neither the Constitution nor the circumstances involved pronounce with perfect distinctness on this claim. It can hardly be expected that the House of Representatives would be willing, or hardly

claimed that it should be willing, to be a merely mechanical instrument in making appropriations to carry out a policy placed beyond its consideration. Its sovereignty in the ordering of expenditure is of the same primary and independent character as that of the President and Senate in reference to treaties.

Madison sent Gallatin abroad to negotiate a treaty, while he was Secretary of the Treasury. The Senate objected in vain. The Senate passed a resolution censuring President Jackson for removing the funds of the United States from the Bank of the United States. "The President, in the late executive proceedings in relation to the public revenue, assumed upon himself authority and power not conferred by the Constitution and laws, but in derogation of both." Jackson sent a protest, and demanded that it should be entered on the journal. The Senate refused, and reaffirmed the resolution. Jackson was so thoroughly supported by the people that the Senate was induced, at a later period, to expunge the resolution.

§ 7. The only conflict of serious import between the executive and the legislative department was that which sprang up in connection with Andrew Johnson. Its lessons are very plain. Congress is not likely to lack strength, but is in danger rather of an excessive use of power. Andrew Johnson was a man of ability and patriotism, but opinionated and obstinate. He had endured a good deal for the Union, and, as military governor of Tennessee, had rendered valuable service. He was rewarded by the position of Vice-President. When he became President by the assassination of Lincoln, it was feared that he would show a vindictive temper toward the South. He shared the extreme opinion as to the in-

destructible character of the States and their right to resume their old position in the Union. Lincoln sympathized with this view, and notwithstanding his adroit and concessive methods, might, with his immense influence, have been a far more formidable advocate of these opinions than was Johnson. Congress, on the other hand, with an overwhelming Republican majority, having carried the war to a successful issue, and being warmly seconded by the people, was not disposed, in reconstruction, to lose any material advantage of victory, or to leave in the soil the seeds of further dissension. Congress was the more anxious as to results, because the Supreme Court was thought to share, at least in part, the more conservative opinion as to the rights of the States in rebellion.

Johnson was disposed to assert his power in reconstruction, and to use it freely. He vetoed in succession important reconstruction measures, measures which in turn were passed over his veto. He took no pains to conceal his opinion of the attitude taken by Congress. The chief attack, however, was made by Congress, and pursued, from beginning to end, on very debatable ground. Stanton, as Secretary of War, was very distasteful to President Johnson, and was in close sympathy with Congress. Congress was unwilling that the President should surround himself with advisers favorable to his own opinions. A bill prescribing the tenure of office of appointees of the President was passed March 2, 1867. Also, at the same date, a requisition was appended to the appropriation bill requiring that all orders directed by the President to inferior officers of the army should be transmitted through the general. The first of these measures, the tenure of office bill, was the chief feature of the strife which fol-

lowed, and the occasion of the impeachment. Against the more direct rendering of the Constitution, and against the practice of the government, settled during the administration of Washington, this bill made the consent of the Senate essential for the removal, as well as for the appointment, of those officers who held office by the joint authority of the President and the Senate. President Johnson regarded this action as a trespass on his constitutional rights, and entered on a line of action fitted to bring the question before the Supreme Court. This was urged in his defence as a most fundamental and undeniable right,—the right of appeal to the constitutional tribunal on doubtful constitutional questions. Congress was put in the position of resisting a reference to the Supreme Court in a case arising under its own alleged trespass, and of insisting that its own claims and the claims of the President should be decided by an impeachment, instituted and determined by itself. A position so arbitrary subjected the entire movement, notwithstanding the soundness of the policy which underlay it, to grave censure.

On August 5, 1867, Johnson requested Stanton to resign as Secretary of War. Stanton declined to do so. He was removed, and General Grant was appointed in his place. Congress refused to ratify the appointment. Grant resigned, and Stanton resumed his duties. The President sent him, February 21, 1868, a message of dismissal, and appointed Lorenzo Thomas in his place. As a matter of fact, the transaction was purely formal. Stanton remained in the discharge of his duties. The claims of the two were simply put in a form in which they could be brought before the Supreme Court.

The tenure of office bill had made a dismissal by the

President contrary to its provisions, a misdemeanor. On this ground chiefly, the House of Representatives proceeded to impeach President Johnson. All other charges against him, such as the disrespectful speeches made by him, were of little weight. Not only was the attitude of the President to the Constitution more respectful of its claims than that of Congress, a technical embarrassment stood in the way of impeachment, even under the tenure of office bill itself. The members of the cabinet were to hold office during the term of the President by whom they were appointed, and one month thereafter, subject to removal with the advice and consent of the Senate. Stanton had been appointed by President Lincoln, and had held office for more than one month after his death, and did not, therefore, come under the special clause of the bill defining the relation of secretaries to the President, and the method of removal. Congress was at disadvantage both on substantial and on formal grounds.

The fact that Congress, when the exigency had passed by, repealed the tenure of office bill, goes to show that it was regarded as a measure disturbing the equilibrium of the executive and legislative departments, and an unreasonable encroachment on the authority of the President. There is no power bestowed by the Constitution more critical in its use than that of impeachment, and especially the impeachment of the President. Many political interests and passions are sure to enter into the effort to remove so high an officer, and one so closely associated with Congress. The procedure is fortunate if it does not wholly lose its judicial character. It is perilously near to a return to a bill of attainder and to the impeachments which characterized the earlier struggles for liberty in England. It is fortunate that so many of the

impeachments ordered and prosecuted by Congress have failed.

In the case of President Johnson, the failure of the prosecution was especially desirable. Mistaken as were his methods, they were pursued conscientiously and within the limits of the Constitution. The remaining period of his service was brief, and no important difficulty attended on his continuance in office. Much of the same exasperation and bitterness of party which led the Whigs to attempt an impeachment of President Tyler was called out in this conflict. The fact that Benjamin F. Butler was among the managers of the impeachment is an indication of the temper in which it was conducted. The opinion filed by such a Senator as Charles Sumner shows how thoroughly, and how unreasonably, President Johnson had become identified in the minds of Senators with the protracted and bitter opposition they had met with on the part of defenders of slavery, and the strength of their determination to tolerate no resistance to a satisfactory settlement of the question of reconstruction. Their attitude was political, not judicial. The vote for conviction stood thirty-five to nineteen. It failed by a single vote. We owe not a little to those seven Republican Senators who broke away from the strongest party influence, and with cool, just conviction, cast their votes against a result so undesirable in itself and so dangerous as a precedent.

§ 8. Another point of disagreement between President Johnson and Congress was the exercise of the pardoning power. This power is granted fully and exclusively in the Constitution to the President. "He shall have power to grant reprieves and pardons for offences against the United States, except in case of impeachment." Ordi-

narily it is an important power, but hardly one of a critical and national character. On the occasion, however, of a wide-spread rebellion, its exercise, as a means of pacification, and of establishing new conditions of union, became an action of wide sweep and utmost moment. It could be so used as to baffle legislative measures.

There is one element of doubt in rendering the Constitution. As no limitation is put upon the power in the Constitution, as the English constitution allows its exercise to precede trial, as the power to pardon after conviction would seem to imply the power to pardon previous to conviction, the rendering of the power by the President and by the Supreme Court has been, that the President might pardon offences in any stage of wrong-doing. Indeed, as the political penalties of rebellion are imposed, for the most part, without trial, the narrower interpretation of the law would give the President little or no function in connection with them.

Congress passed an act, July 17, 1862, authorizing an extension of pardons by the President in connection with the rebellion. December 8, 1863, President Lincoln issued a proclamation granting pardons. He referred in it to the act of July, but also affirmed the independent right of the President to grant or withhold pardons at his discretion. On May 29, 1865, President Johnson issued a proclamation of amnesty and pardon, excluding fourteen classes. Congress repealed the act of 1862, July 21, 1867. On September 7, 1867, the President issued a second proclamation, excluding three classes; and again a third proclamation, July 4, 1868, with still fewer exceptions. On December 25, 1868, he proclaimed a general pardon. July 12, 1870, Congress annexed to an appropriation bill an act ordering that no pardon granted

by the President should be pleaded in the Court of Claims, and that no appeal should be had to the Supreme Court in any case of any claim based on such a pardon.

The Supreme Court, 13 *Wallace*, 128, affirmed the law to be unconstitutional, as being in violation of the constitutional rights, both of the President and of the Supreme Court. It had been affirmed by the Court, January 14, 1867, that Congress could neither limit the effect of the President's pardons, nor exclude from them any class of offenders; 13 *Wallace*, 141.

The power of the President is at once great and small. When circumstances favor its use, his influence is very extended; but when he is in disagreement with the legislative department he cannot easily withstand it. This is seen in the cases of Andrew Jackson and of Andrew Johnson. Jackson, by virtue of great popularity, ultimately gained the legislature and so won his battle with the Senate. On the other hand the policy that Johnson favored gave way at all points before the hostility of Congress, and he himself barely escaped expulsion from his high office. In the case of impeachment, Congress is both accuser and judge.

§ 9. The separation between the executive and the legislative departments results, in the case of serious and protracted contention between them, in the restriction of the former. The legislature, as the history of England abundantly shows, has the advantage in any severe struggle. Parliament gradually wore down the authority of the king, and finally displaced it by that of the cabinet, responsible to itself. The fact that Congress controls expenditure, that it is in much wider and more immediate connection with the people than is the President, and that any trespass it may commit upon his authority admits of

very slow correction, makes any conflict between them very unequal. The executive has found occasion to use the veto power freely, and it has proved but a limited protection. If Congress is under the control of the adverse party, or if the President fails to win the hearty support of his own party, he is easily vexed, thwarted, and maligned in his administration. The fact that no executive officer, no member of the cabinet, has a seat in either chamber, makes defence very difficult. The executive branch has no direct and legitimate way of bringing its case before the people.

Much of the patronage which has been given to the President has been administered by Senators. They claim it and use it as a political instrument in the administration of parties. This, with the hold they have on the legislatures of the several States by virtue of their method of election, oftentimes makes them political dictators in their own field.

The President is as dependent as any other officer for nomination and election on the political party which he represents. He cannot easily take any independent attitude in reference to it. His bondage is proportionate to the favor conferred upon him and to the manifold favors which he is to confer in return. Civil service makes for the comfort and the dignity of the President. He is no longer in the formal possession of powers which he cannot actually exercise.

§ 10. One of the most important duties entrusted to the President is that of negotiation. Yet he is much restrained in its performance. Discussions, resolutions, and requests in Congress are liable at any time to bring embarrassment to the President; and a treaty which has cost much labor may, as in the case of the arbitration

treaty, be criticised, delayed, and finally thrust aside in the Senate for reasons of a vague and doubtful character. A successful use of executive powers is only possible in connection with close, sympathetic action on the part of Congress. It becomes, therefore, a serious defect in our Constitution that it provides no means for concurrent counsel and action. A power is entrusted to one department which can only be advantageously used in close connection with another department, and yet the two departments are left to make whatever terms or fall into whatever dissensions may chance between them. Unity of sentiment is made to depend on personal tact and political interests, instead of being profoundly involved in the discussion and the development of events. There must be harmony in a strong government between the legislative and the executive branches. They have to do with different relations of one policy. The conditions which should control legislation are brought to light in the administration of law and in executive activity. Legislation cannot proceed prosperously without a full knowledge of the circumstances under which it is to be applied; nor can the executive, under any exigency, feel sure of his ground if he does not enjoy the cordial support of the legislative body. These obvious facts have had hitherto less weight with us than belong to them, because of the easy and safe conditions that have usually fallen to us as a people.

Independence between these departments is a less fundamental principle than harmony. We have done more for the former than for the latter in our Constitution. We have relied on favoring circumstances and on the unity of the people to keep the two branches in line with each other and with public opinion. In the degree

in which politics becomes a craft,—the craft of a few who are but feebly aware of the better and more settled sentiments of the community—this independence of departments is liable to lapse either into strife or into subservience. We are likely to have a President who, in a firm discharge of his duties, chafes under the criticism and obstruction of Congress; or one who submits himself to the influences nearest to him, and is borne on by political forces which he may seem to guide but by which he is governed. We have made no sufficient provision for counsel and concert between the two great departments, and their relations are, therefore, almost necessarily subject to accident or to intrigue. The history of the English constitution, which was ripened under a long experience in the perplexed and critical school of liberty, teaches us a very different method from our own. The impeachment of a President is almost as much the impeachment of a department as of a man. It leaves us where the House of Commons was when its last defence was to impeach the ministers of the king.

§ 11. Congress itself, in its two chambers, has developed in a direction hardly anticipated, and in a way in which it has become less the organ of national life. It is a primary function of a legislature to aid in expressing, and in unfolding, the national life; to become the conscious and vocal centre of that which is most characteristic and expressive in political thought. The Senate was intended to be, and, in the outset, was, closely united with the executive department. For five years its sessions were secret. A stenographer was not admitted till 1801. For twenty-five years it was without committees. Representing the sovereignty of the States, it was to surround and sustain the greater sovereignty of the nation. The

Senate has become a sluggish and conservative branch of the legislature. Its small numbers, the long period of service of its members, the common practice of returning Senators for several terms, the age and dignity of Senators, its indolent and easy methods, a membership very generally associated with the wealth of the community represented, the political leadership of Senators in their several States, and the long period required in which to change its political complexion, make it a body through which it is very difficult to force progressive measures, and not easy to touch anew with any vital impulse. It is conservative to a degree that often puts it out of sympathy with the mass of the people.

The Senate, in its original construction, was a concession to the smaller States, and the nature of this concession has become more significant, rather than less significant, with the progress of years. When the smaller States are scattered among the larger States, and are subjected to much the same conditions, the concession made to them is not one of much political moment. The case, however, is altered when they fall into groups with interests of their own in conflict with the general interests. Thus in the slavery controversy not only were the Southern States granted a partial representation of their slaves in the House,—in the Senate, which was made the stronghold of slavery, the numbers represented by Northern and Southern Senators were relatively increasing in favor of the North. The growth of population was most marked in the free States. In 1860, the census just preceding the war showed six of the eight largest States to be free States and two to be border States. In the very critical discussion which has arisen in connection with the currency, the extreme Western States, governed

by somewhat narrow and local interests, have favored every effort to maintain the value of silver. Yet ten of these, commencing with Nevada, have an aggregate population not much surpassing that of New York City, and have twenty votes in the Senate, while the city has the fraction of one. The financial interests represented are in still greater disproportion. When, therefore, these States press a financial policy ruinous to the entire nation, this inequality of representation becomes unsatisfactory. The tail is allowed to wag the dog.

The control of the Senate easily slips from the dominant party. Some third interest, like that represented by the Populist, enters, and legislation assumes an uncertain and irresponsible character. That is done which can be done and not that which the people wish to be done. A disturbing element, once established in the Senate, may exert a very disproportioned and disastrous influence which it requires a long time to eliminate.

§ 12. The House has also much changed in character. It has lost, in a high degree, the power of deliberation, and has become the direct and ready instrument of the ruling party. Its office of concentrating, quickening, and guiding the national life by discussion, and a reconciliation of all interests, has disappeared. It falls, with its accumulated weight, into one or the other political pan, till the people in sheer impatience shift the balance. The criticism of an active opposition and the restraint of an easy loss of power are almost wholly wanting. The Speaker has become the despotic master of the House, and only those measures which he, as leader of his party, favors, gain any consideration.

Reasons can be given to justify this change; the size of the body, the multitude of the measures proposed, the

absence of any other efficient guidance, the futility of discussion that is directed as much to one's constituents as to the case in hand, the strength of party discipline, and the fact that discussion has ceased to influence action. All these reasons, however, only reveal the fact and arise from the fact that the House is ceasing to be the council of a great nation and has been turned into the seat and instrument of party politics. The Speaker, the most potent political factor in the government, wields his power not by the choice of the people, not in the performance of any definite duties they have assigned him, but as the result of an unintentional decay of political life and an unwholesome growth of political parties. Natural as the change has been, it is not one which stands for the favorable development of free institutions. It is rather one which, while making the decline of legislative vigor for the moment bearable, itself becomes more and more objectionable. It is one step in that furtive transfer of political power from the people to political parties. It marks the partial miscarriage of the primary purpose of liberty.

Free institutions have, in themselves, less force than other institutions. It is of the very nature of freedom to leave more, not less, to the choice of the people. The popular mind has expected more, far more, from institutions than it had any right to expect, and demanded less, far less, from itself in the use of these institutions than it ought. It is of the very nature of liberty to open the door to the evil and to the good, to the indifferent and to the devoted citizen alike. We have suffered, as a people, immensely from extreme individualism. The one party has held it as an avowed doctrine of obstruction, reducing government to its lowest terms; and the other

as a doctrine of progress, furtively diverting government into the support of special interests. Individualism as an extreme principle may equally be urged in defence of indolence and of aggressive activity. The conflict between individuals may be allowed to proceed, the government retaining the attitude, aside from certain conventional, half-hearted duties, of an indifferent spectator; or the stronger, more enterprising classes may have the right of way, and capture for their own ends the aid of government. Individualism has taken constantly with us one or other of these two directions, which, under the show of opposition, are both ruled by one self-seeking temper. In the meantime the public welfare, the concurrence of powers in all persons and classes, the reciprocal aidfulness of the individual and the community, are neglected.

Under the individualistic temper politics becomes simply another field to be explored and exploited in behalf of the adroit and unscrupulous. The party tie, as an essential means to success, receives exaggerated emphasis. It is identified with patriotism, and its preservation is urged as the first duty of the good citizen. Thus tyranny, which always means the trespass of unrestrained individualism, sets in from all sides, and fidelity is made the catchword of its adherents. We suffer that astonishing travesty of liberty in which we take the will of leaders, whom we have in no way chosen, as our will.

The great advantage of a free government is not that it leaves every man to fulfil his own individual impulses, but that it enables the people, if so disposed, to define and enforce reciprocal rights, to secure a collectivism that assigns the best bounds to individualism. Collectivism is free government on its positive side; individualism is

free government on its negative side. In good government the two are reconciled. The lesson which a free people must first learn is the lesson of responsible, collective action. The wisdom and force of law are in the minds of the people, and must be maintained there as a living, growing force. No government decays more rapidly than a free government when the people fail to apprehend it, or negligently turn from it.

§ 13. The old man of the sea, riding us to our overthrow, submerging us ever deeper in the water, is the supremacy of politicians, men who have aptitude for intrigue and who take to themselves public affairs as the best field for its exercise. Their instruments are personal influence and interest, the caucus, and the political convention. Their code of morality is made up of the simple sentiment, faithfulness to party. With this meagre equipment they come between the people and their civic duties, and turn our liberty into a vulgar illusion. A partisan temper, nourished as a life-long faith, and fed by any and every form of victory, blinds the judgment and satisfies the feelings. The mass of citizens are led by the catchwords familiar to them, and with a very obscure apprehension of the insignificant part they are playing.

When the people unexpectedly find that great evils have crept into society, as the fruit of this government by those busy with their own schemes of emolument; that wealth has grasped successfully at opportunities which belonged to the people in common; that taxation has become unequal and oppressive; that inefficiency and corruption have characterized municipal affairs, they become restive and unreasonable. They distrust institutions which have betrayed them, because these were first betrayed by them.

Our national life is to-day greatly weakened by the disillusion we are undergoing in reference to our free government. We get back slowly and painfully to the solid principle—no more applicable to our government than to all governments—that the means must be proportioned to the ends, that an intelligent, patriotic, public-minded people is the only guaranty of a good government.

The evils of which we have spoken are symptomatic and partial. They call for no profound remedy in forms, but a constant correction in spirit. They constitute an earnest appeal to the nation for a more pervasive national life; and they may beget such a life. They belong to that class of difficulties which serve to instruct and stimulate those subject to them; difficulties that we always have with us. It may be deemed fortunate that when political influences of the narrower order have so conquered the House, a stubborn conservatism finds shelter in the Senate. The diagonal direction between the two is not as dangerous a path as either might pursue separately.

CHAPTER VI

Strife between Classes

§ 1. THE conflicts we have now considered have lain between local and national government, between diverse forms of local government, and between the different departments of government. The first two of these the war of the rebellion brought to an end; nor are they likely to revive again. We have now more to fear from an undue predominance of the central government than from any centrifugal restlessness of the constituent States. The third contention, that between departments, has never been threatening and in its most violent form was an incident of the Civil War. The United States has won a nationality very complete, and constantly becoming more so, as regards the relation of its several local portions to each other, and as regards the harmony of administration between its departments. Our present danger is the reverse of that which lay in our path at the beginning. The magnitude of the interests and powers which gather about the General Government are ready to dwarf those more specific and social duties which remain with the States. The General Government, in taking to itself the innumerable and pervasive interests associated with interstate commerce, becomes more impatient of any disorder in any of the States, and more inclined, as in the disturbances of 1894, to correct it at once with the strong hand of power. There is in this both evil and good.

When local strife involves social questions of moment, physical force offers no adequate and final solution. We may well contemplate with regret the summary way in which it pushes aside and postpones contention that is waiting the reconciliation of justice and of truly common terms of life. There is a hard and unwise conservatism ready to applaud this prompt intervention of national power. Yet it has in it much of the concealed virus of tyranny. Few social evils are likely to find adequate correction while they can be swept aside by sheer force.

§ 2. There is a fourth contention upon us, which will be only the more severe and dangerous because of the great extension of our common life and growth of our national power—that springing up between classes, or, as it is sometimes put, that between the classes and the masses. This is a strife far more penetrative, more inimical to national life, than those which have preceded it. We reach in it the great disintegrating causes in society.

We have now to settle what has not been settled in human history—the terms under which men can happily labor with each other in behalf of and in submission to the public welfare. This is the fundamental question of national life: whether, its formal terms being advantageously settled, that life can expand under them and a people be thoroughly integrated, within and without, by vigorous and prosperous growth. The prosperity of a people can no longer be defined in terms of wealth merely, or civilization that attaches to classes; it must be defined in terms which express the common social welfare, and run through the body of the nation.

The very rapid development of production during the last century, of which we as a nation have given a conspicuous example, has made prominent the question of

classes, and the division of advantages between them. The value of a fresh continent, of manifold inventions and discoveries, of free institutions, is not a little more political power, but a more equal and enjoyable participation in the fruits of collective labor; a life that can fairly be called a life of the people. If free institutions do not manifestly tend to this result, they, like other institutions, become a mockery of the popular mind. It is doubt at this point which occasions more restlessness, more distrust of our national development, than any other feeling. If we are to repeat the history of the world, as it has been rehearsed up to the present time; if it is only a momentary relief that we have gained by the large opportunities which have fallen to us in a fresh continent; if we, in turn, under the old familiar laws of competition and trade, are to sink back into oppugnant classes, into unendurable poverty and inadmissible wealth, then the decay of our national life is predetermined, and the extinction of those hopes we have associated with liberty. Our true contention is with social principles, with those physical, commercial, and moral forces which have so far separated men from each other, and seamed in all directions the civic combinations they have been able to secure.

We have started on this struggle for a common life, a struggle which must deepen in intensity with every people as it grows in prosperity. We have associated liberty and equality, and made the one the guaranty of the other. Though we have not understood our primary principle of freedom, either in its scope or its method, we have still trusted that it would lead us, by an inevitable force of its own, into general and diffused prosperity.

We have thrown our entire strength into production;

we have accepted inadequate economic laws with the confidence and simplicity of childhood; we have believed the individual sufficient unto himself, and that liberty lies primarily in clearing the field for him. We are awakening but slowly from this illusion of a national life wrought out by self-interest on an industrial basis simply. We are beginning to see that many of the things which should have accrued to the common welfare have been stolen while we slept; that our public affairs have been shamefully mismanaged; and that we are in danger of coming under two of the worst forms of tyranny: that of wealth in our social life, and that of corruption in our political life.

The decay which has crept in unawares, and the disclosure of growing injustice which has come as a shock, have separated classes and brought them into collision, with much strain of national ties. It is some of the leading features of this dangerous struggle—so easy of exaggeration, so easy of neglect—that we wish to consider. Here more than elsewhere will be found the influences which are to control our future growth as a nation.

§ 3. The basis of liberty—it would be better to say the basis of individualism—in the field of production is freedom of contract. Perhaps not another principle has come as frequently under judicial consideration as this primary law of existing commercial relations, the freedom and obligation of contracts. Among the few prohibitions laid in our Constitution on the States is the prohibition that they shall pass no law violating the obligation of contracts. The portion of our divided government which is most domestic in its character and nearest to the people is that of the States. Here the temptation is most constantly present to interfere with personal rights.

It is one of the felicities of our government that it provides a comprehensive supervisory power, itself less tempted and less able to trespass, that is ready to restrain the States in any departure from certain fundamental principles of good government.

This principle of the freedom of contract, while it is a first condition and expression of commercial liberty, must take on serious qualifications if we are to move freely forward into those complex states of society in which personal liberty must often be waived in one direction in order that it may be secured more fully in other directions. An absolute freedom of contract, with its correlative term, the obligation of contracts, would imply equality of powers and conditions between contracting parties and a constant deference on their part to those overruling social interests in whose meshes their particular agreements were enclosed. If we are to make a ring around two combatants, we must justify the battle as in itself fair and honorable, and as consistent with the general welfare of society. Otherwise our liberty becomes of the nature of license, and will provoke extension and retaliation.

§ 4. Our experience as a nation under this principle has lain, first, in its establishment, and then in a slow discovery of its many limitations; and a painful assertion of them. One of the earliest and most successfully performed duties of the Supreme Court was found in interpreting and enforcing this restriction of the Constitution. A leading case, one whose influence has been very extensive, was that of Dartmouth College, 4 *Wheaton*, 518. It was decided that the college was a private corporation, that any alteration of its charter by the Legislature of New Hampshire, without the consent of its trustees, im-

paired the obligation of contracts. Chief-Justice Marshall gave the decision, supported by Justices Story and Washington. Five of the six judges concurred. The two significant points were that the college, notwithstanding its public and eleemosynary character, was a private corporation, and that it held its rights beyond the power of control of the legislature.

In 1827, in the case of Ogden *vs.* Saunders, 12 *Wheaton*, 213, the same question of contracts arose in connection with a bankrupt law passed by the Legislature of New York. Webster, whose plea in the Dartmouth College case had gained attention, argued with great subtlety that the bankrupt law in question impaired the obligation of contracts, and could not be enacted by a State. Marshall and Story, so closely identified with the earlier decision, regarded the law as unconstitutional. The case was decided, four to three, that a law discharging a person in connection with his future transactions from the claims of his creditors, was not a law impairing the obligation of contracts. The property acquired and the debts contracted subsequent to the law came under the conditions assigned by the law. Thus the principle prevailed, that the obligation of contracts might be modified if the action was not retrospective. This was a concession which Marshall, Story, and Webster, who had been so active in maintaining the principle of inviolability, were not willing to concede. The decision was, in fact, an illogical one, but in wise concession to the public welfare. It did not allow the tie of contract to be drawn so closely as to constrain and strangle still greater interests.

In the case of Jackson *vs.* Lamphire, 3 *Peters*, 280, it was decided that a law requiring the recording of a deed,

or a law in limitation of the period of legal claims, was not an impairing of contracts. Contracts remained subject to the general safety and convenience of the public. Thus inviolability was not to be pleaded in so absolute a form as to preclude laws of general protection.

The case of Providence Bank *vs.* Billings and Pittman, 4 *Peters*, 514, carried the limitation of contracts one stage farther. Contracts were not to be pleaded in suspension of the ordinary functions of government. The Providence Bank resisted the imposition of a tax because its charter, a contract between itself and the government which defined its legal status, made no provision for taxation. The Court held that the power to tax was of vital importance to the State; that the release of this power was not to be assumed; that if released at all, it must be released in express words; that it was not necessary to reserve this power in a charter. A charter imparts the character and rights of an individual to a corporate body, but the liability to taxation is one that rests on all individuals. If any exemption is made it must be definitely conceded. The corporation is not to stand on a higher, more impregnable ground than does the citizen.

§ 5. In the suit of the Proprietors of Charles River Bridge against the Proprietors of Warren Bridge, 11 *Peters*, 420, the implications of charters were extendedly discussed. The case covers, as reported, 239 pages. The court was divided, four to three. Webster was present to sustain the charter as a contract, and Story was again in dissent from the opinion of the Court, which sustained the legislature in granting a second charter in limitation of the earlier one.

The Charles River Bridge Company had been given the right to build the Charles River Bridge, superseding a

ferry owned by Harvard College and extinguishing the claims of the college by a yearly payment. Later, the Warren Bridge Company was chartered and given the right to build a bridge just at hand and in disastrous competition with the earlier bridge. It was urged by the plaintiffs that the exclusive character of the charter was a necessary implication, that its value depended upon it, and that the equivalent they rendered the public, representing the State, was, in a large degree, lost by them, if another bridge was to be granted the same privilege. The decision of the Court was given by Chief-Justice Taney, and was an early illustration of the temper he brought to his judicial work.

"The object and end," he affirmed, "of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing this end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new demands of commerce are daily found necessary both for travel and trade and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished."

The case of the Providence Bank was especially relied on in this decision. But it is plain that the conclusion reached was not a repetition of the rendering in that case, but a marked extension of it. The power to tax is fundamental, liable at any moment to be called into exercise. It has no direct connection with a bank charter more than with many another charter. The inference which

suspended this right of the State was a remote and violent one. There was much assumption in pleading this implication against the State in the exercise of its habitual function. In the case of the Charles River Bridge the exclusive character of the charter was an essential part or measure of its value. The very reason why a charter was sought lay largely in the fact that it conferred a privilege, to wit, that of building a bridge under the conditions then present. If the granting of the right by the State did not exhaust its power in this direction, the case was very much as if the State should proceed to a second sale of the same piece of property. The Charles River Bridge Company rendered its service to the public, a service somewhat more immediate and exacting than that of a bank, on this very understanding that its privileges were its own, were exclusive. The very obviousness of this conclusion might be offered as a reason why no specification to this effect appeared in the charter.

The right, also, of the State to charter another bridge, in competition with the first bridge, was not, like the power of taxation, a necessary and inalienable power. It was only a specific act included under its general power to provide for the general welfare, and in and of itself of no great significance. If its exercise in the first charter had been held to restrain its exercise in a second charter, the limitation of the right of the State would have been inconsiderable, and would have been its own act. The losses incident to it would have had their compensations in the advantages secured by the first bridge. The lessons taught would have been, on the one side, a faithful and large adherence by the State to its contracts, and, on the other side, caution and foresight in forming these contracts.

§ 6. The principle involved in the Charles River Bridge decision looks to the conclusion that the State cannot bind itself to the permanent restriction of its powers; that the essential duty and right of the State to watch over the general welfare are always present; that it cannot, like an individual, be put to a permanent disadvantage, in the performance of its function, by contracts with individuals. It is doubtful whether even the most explicit words can divest the State of its fundamental rights; whether it can contract away its indefeasible powers. These rights and powers spring up anew in everlasting youth, born, in the second instance as in the first, from the necessity of the case. The laws of to-day, even the current Constitution, can be repealed to-morrow and replaced by wholly new obligations; themselves to last only so long as they subserve their purpose. The whole can never be bound by the parts; the inner life cannot be compelled to submit itself permanently to the restraints which have been slowly accumulated upon it; each generation is the compeer of every other, and is not to find its privileges sold from under its hand by a previous generation. The nation asserts itself with powers constantly renewed; it is ever abrogating the old in some fresh way for some broader end. How far it will accept the past, and how far reject it, is an ever-returning question involving the deepest wisdom.

This case is an excellent illustration of the fact that no principle, not even the soundest, can be applied in an inflexible way. Principles cut into each other, supplement each other, and sustain each other as all equally parts of a comprehensive whole. Looking at subsequent events, we cannot fail to see that the absolutism of Marshall and Webster were, in this instance, advantageously

displaced by the opportunism of Taney. The State cannot be left to sell itself out to corporations. It cannot, in the presence of a future that holds so many unseen dangers, bind itself with bonds it cannot snap asunder. It is like the conscience of the individual—it may freely reverse its own decision, and transfer the undying obligation to a new position. The State is the one terminal bud that breaks through and pushes back all its scales when it no longer has need of them.

§ 7. This doctrine has since been made fruitful in many little and large ways, and has much work yet to do. No sooner does any one throttle the State than he is seized with a supreme sense of the sacredness of vested interests—of "fidelity to property." In the case of Armstrong *vs.* the Treasurer of Athens County, Ohio, 16 *Peters*, 281, the land which had been granted to the University of Ohio, and which had been held by the university free from taxation, was pronounced open to taxation in the hands of a purchaser. It was decided, State of Maryland *vs.* Baltimore & Ohio Railroad, 3 *Howard*, 534, that a State could repeal a penalty in a contract, if of the nature of a punishment. In the act of incorporation it had been stipulated that certain forfeitures were to be incurred under certain conditions. These were not placed beyond the power of the legislature.

It was affirmed in the case of the West River Bridge Company *vs.* Dix and others, 6 *Howard*, 507, that a State may condemn property held by a corporation under its charter. The primary purpose of a law of incorporation is to give to a combination of persons the power, within certain limits, to act together. It imparts to them a legal personality. As a charter lies at the basis of such a body, the tendency became, under the doctrine of the

obligation of contracts, to give a corporation, not the same safety and liberty which belong to an individual, but a greater safety and a more absolute liberty. A specified circle of rights, enlarged by multiplication, was established in the State, in a high degree independent of it. If we take a joint-stock company as an example, we shall find that we have in it a legal personality that in some particulars transcends in advantages the persons side by side with whom it operates. The joint-stock company is capable of indefinite life. It may pursue an expansive policy, untouched by the decay and death incident to individuals. It may accumulate capital equal to the demands of the greatest undertakings. The best methods are within its reach. Its capital comes from many sources, imposes little or no burden on those who contribute it; it is subject to no vicissitudes other than those of the business itself, and is not liable to be withdrawn. The risks of those who hold stock are confined to a single sum. The independence, power, and safety of movement of a prosperous company are much greater than in the case of the individual. It is a giant among pigmies.

It has the further advantage, from a business point of view, that it labors under none of the personal claims, sympathies, and appeals of duty which fall to the individual. It runs its race with none of the social weights which embarrass persons. If now we are to add to these advantages an unusual immunity, by virtue of a charter, from the claims of the State; if the State can do nothing to modify or reclaim the rights it has hastily conceded; if a charter can be pleaded against the familiar regulations of the State, then we have in the corporation a legal personality which can not only push aside the citizen, but

defy the State itself, their common representative. There is that born of the State from which the State soon recoils in dismay and fear. The only safety of the community is found in that brief moment, that transient opportunity, which accompanies the concession of a charter. The ignorance, negligence, or corruption of a public servant may let in a flow of evils which all later framers of law must accept and support.

There was sure, therefore, to arise, there must arise, another doctrine than this of the obligation of contracts, a doctrine which was becoming the security of a wrong once inflicted. The State must have power, equally for its own sake and for the sake of the citizen, to preserve and to rescue its own. Every pilfering process must be set aside, and all the more when it is accomplished under the forms of law. Yet most plainly this work is an exceedingly delicate one. The State cannot take the attitude of refusing to be bound by its agreements—of keeping no faith with its citizens. When it makes an explicit agreement that runs for a definite period,—as a contract for the performance of some work—its integrity should be of the most undoubted order. Yet, even the State ordinarily refuses to be sued, and constitutes itself the judge of its obligations.

§ 8. There is plainly a real, though it may be a somewhat vanishing, distinction between the obligations a State assumes with its citizens. Some are so contained in the ordinary relations of business as rightly to give rise to a claim for redress if they are violated. A bridge is left in an insecure condition; a citizen suffers injury thereby. It is better, both for the person suffering, and for the State inflicting, the injury, that it should be open to correction. The State should be subject to some

coercion in the performance of its duties. The State refuses to build a bridge which would promote the public welfare. For this neglect there is no redress. The State cannot have its work defined for it by its citizens, or be driven forward in its accomplishment. No sharp line divides the two classes of cases from each other. In the municipal affairs of a great city they blend in every variety of way. In one relation a citizen is acting with his fellow-citizens, and with them constitutes the State and shapes its policy. In another, he is acting as a private person under the State, which he encounters as an independent party. He assumes obligations toward the State, and the State accepts obligations toward him. The responsibility of each to the other is of equal moment. The State, however, has always in such transactions a double bearing, that of simply a party to an agreement, and that of one by whom the public welfare is held in perpetual trust. The first very subordinate relation cannot be allowed to override the second fundamental relation. A parent may come under a promise to a child, but if in its fulfilment he is suddenly confronted by his duty as a parent, that duty may act in suspension of his word.

§ 9. Much the same distinction arises in the relation of a city to the central government which includes it. There are many rights and duties of a city which approach closely those of a simply private corporation. It possesses property, requires services, and renders services on fixed business principles. In the midst of complex affairs it may be a wide participator. On the other hand, in the general maintenance of the conditions of health and good order, and in the enforcement of law, the city is one constituent in the State, and the supervisory power

of the State is as applicable to it as to any portion of its territory. The question, then, of the proper bounds of local government and central government, of municipal affairs and State affairs, is not unlike that of the separating line between the immediate and transient obligations of government and its imperishable, indefeasible duties. Much remains to be done in analyzing these complex relations, in separating the local from the general interest, the transient from the permanent safety of the citizen. The narrow claim is sure to be urged more vigorously than the wider one. Public opinion, precedent, and private feeling are likely to gravitate toward the immediate right, and to leave the more comprehensive idea to make what shift it can in the presence of clamorous interests.

§ 10. The form under which that portion of authority in the government which refuses any final pledge has been asserted and defended has been that of the police power. This power is a comprehensive one, not easily defined, yet not difficult of application as cases arise under it. Each instance brings its own light with it. The core of the idea is the supervision which the government is bound to exercise over the morals, health, good order of the community. The sphere alters and enlarges with the change of circumstances and the growth of civilization; and the State, in order that its wisdom and providence may have full expression, must preserve to its utmost limit this police power. The absence of a final definition is not so much a defect as it is an ever-renewed opportunity. The State has occasion to do many things as if it itself were a person or a private corporation. These acts may well come under the laws which lie between man and man. It has also occasion to preserve

unrestricted its higher sphere of correction and guidance. This is spoken of as its police power, because it finds its most palpable expression in its police. In this power the supremacy of the State is in constant and vital exercise. It cannot be frittered away by contract. The State cannot suffer the losses of a spendthrift. It cannot let the years gnaw at the heart of its own strength.

If we take as an example the restrictions of any branch of trade, made fitting by the growth of social obligations, such as that in intoxicating drinks, the State frames these laws of regulation as the safety of the community calls for them, and leaves the damages thereby done to property to fall as they may. This is both just and expedient. The cost of progress is not to be taken from the individual and thrown upon the public. This would be to add another great obstacle to social growth. Public opinion, in a case of morals, ripens but slowly. Restraint is gradual in its application. The citizen has time enough in which to discern what the public welfare demands, and to adapt his action to it. If he is too stupid to anticipate desirable change, or so wilful as to resist it, the disaster properly falls on him. The case is not this: the manufacture and sale of intoxicating drinks, sustained by the entire community up to a given moment, and then suddenly and peremptorily forbidden. It is this: a long struggle in which the injury of the traffic becomes more apparent and the censure more pronounced—a struggle brought to a close only when the attitude of all persons toward the public welfare has become plain. Each man must then bear his own losses, under the inevitable movement.

In the case of an invention that may greatly alter the methods of production, those pursuing the old way en-

dure the losses of change. Many, without any remissness, suffer severely from the progress accruing to the community as one whole. It would be a strange maladjustment if manufacturers and traders should be relieved by the public from the fruit of sluggish morals, and laborers be left to take their chances in the shifting of production by machinery, without the slightest fault on their part. That any should have entertained such an idea shows how unwisely and how unfairly, between class and class, we are disposed to apportion the difficulties incident to growth.

It would be inexpedient for the State, aside from any lack of just claim on the part of those whose interests are an obstruction to its progress, to take to itself the entire cost of improved morals. The struggle upward is at best a slow and painful one. If the State were to assume the losses incident to the reluctance of its citizens to accept the better conditions, growth would become much more difficult. Its cost would be largely transferred from those opposing it to those favoring it. The offender would go comparatively free, and the reformer would bear his burden. The apportionment of the losses and the gains of growth under natural law cannot be very much altered by the State. The citizen may well be called on for forecast and consideration in connection with every personal interest which touches the public welfare. He is not at liberty to stand in the way of the State, much less by contract to claim a permanent advantage over it. This is the sacrifice of supreme interest in the presence of secondary ones.

§ 11. The Legislature of Mississippi chartered, in 1867, a lottery for twenty-five years. The lottery company paid $5000 to the State University, an annual tax of

$1000, and one half of one per cent. of its receipts for tickets. In 1868 the Constitution of the State was altered and forbade lotteries. It was held, Stone *vs.* Mississippi, 101 *U. S.*, 814, that the Legislature of the State could not bargain away or bind the police power of the State. Any contract that entered this charmed circle lost its controlling power. The flax perished at once in the flame of right. The people themselves cannot bind themselves in the face of duty. Posterity is to be protected from any voluntary entail of wrong-doing.

The Legislature of Louisiana incorporated, in 1869, the Crescent City Company, giving it a monopoly in landing and slaughtering animals. In 1879 a new constitution gave the control of the business to the municipal government. The city of New Orleans restored freedom to the traffic. In the suit of the Butcher Union Company against the Crescent City Company, 111 *U. S.*, 746, Justice Miller said that the charter of the Crescent City Company, in view of the expenditure it involved, was an undeniable contract, that it was set aside by the action of the city, but that the legislature could not bind the State in a matter of public health. The assertion in this case was not that a method which better served the public welfare could displace one less advantageous in this particular, but the broader affirmation that in a question involving the public welfare, any change was open to the people.

That all rights of the individual and of a corporation are subject to the police power of the State was enforced in the case of Beer Company *vs.* Massachusetts, 7 *Otto*, 25. In the case of Fertilizing Company *vs.* Hyde Park, 7 *Otto*, 659, the ordinance of the city abating the company as a nuisance was held good as against the

privilege granted by its charter. The opposite doctrine, that the action of a city in excess of its rights as a ruling body is not binding, is brought out in the case of Parkersburg *vs.* Brown, 16 *Otto*, 487. The Legislature of West Virginia had authorized the city of Parkersburg to issue bonds as a loan to a manufacturing company. The taxing power, so frequently protected against abridgment, was now restrained from undue extension. It was held that this power no longer retained its legal force when used for a private end. The city had no right to assist a private enterprise by resources drawn from the public. This principle, thoroughly applied, would be destructive of protective duties. Taxation can only be used in aid of a public object, an object within the purposes for which government is established; Loan Association *vs.* Topeka, 20 *Wallace*, 655.

§ 12. Liquor laws, both those partially and those completely prohibitory, are expressions of the police power. It was early held, License Cases, 5 *Howard*, 504, that the States had the right to lay restraints on the traffic in intoxicating drinks. The exercise of this right came in conflict with the control of interstate commerce by Congress. The right was upheld on two grounds: that the States were in possession of a concurrent power of regulation, provided that they passed no laws in contravention of the laws of Congress; and that laws in restraint of this traffic were police laws, and not laws intended to regulate the commerce of the States.

Later, when an attack was made upon the prohibitory laws of Iowa by an extensive importation and sale of liquors in the original package, the position of the Supreme Court taken in the License Cases was modified; Leisy *vs.* Harden, 135 *U. S.*, 100. These sales were

upheld as a part of interstate commerce. Justices Gray, Harlan, and Brewer dissented, adhering to the more simple and convenient doctrine that prohibitory laws were to be accepted as an exercise of the police power. The earlier view was the more adequate and consistent disposition of the question. It does directly what is now done indirectly, and does it under the fundamental principle of the plenary character of the police power; Kidd *vs.* Pearson, 128 *U. S.*, 1. If we regard the sale of liquors in prohibitory States in the original package as an act simply of interstate commerce, under the protection of the General Government, we at once embarrass the prohibitory State in the exercise of its police power, and yet fail to restore interstate commerce. Free subsequent sales are essential to uninterrupted commerce. If we allow one State, under the idea of interstate commerce, to force one sale, and the resistful State to restrain all subsequent sales, we give occasion to an unfruitful and exasperating conflict between them. Neither interest is adequately protected. There is no harmony in our method. In the case of oleomargarine, the court seems to have accepted the more consistent principle; Powell *vs.* Pennsylvania, 127 *U. S.*, 678. A law of Pennsylvania which forbade the having in possession of oleomargarine with intent to sell, was pronounced constitutional. The language is, " to have in possession with intent to sell." This makes no exception in favor of the original package.

Under the later rendering of the liberty of sale in original packages, Congress came to the relief of the prohibitory States in the Wilson law, which forbids importation and sale in States that reject the traffic. Police regulations have so much of the native quality and essential substance of local government that we can hardly

trespass on this government in a way more undesirable than by subjecting the regulations of one State to those of an adjoining State. There is no reason why the free sales of one State should be transferred to another State, any more than there is a reason why the restrictions of the latter State should be imposed upon the former State. The boundary of neither State should be invaded by the other. That is the simple principle of perfect comity in self-government.

§ 13. Most judicial questions which involve any fresh departure in economic and social relations are likely to reach the Supreme Court of the United States. The defences of the Constitution of the United States are brought forward and set up against the new principle or the new application, and so the case reaches the final tribunal. It thus becomes of utmost moment that this court shall not only have a firm hold of judicial ideas, but also shall have an equally clear perception of the modifying force of the changing and progressive social states that may be involved in the inquiry. The first without the second makes the court the organ of a purblind conservatism.

A good illustration of this double necessity, and of an unusual expansion of governmental supervision, was furnished by the case of Munn *vs.* Illinois, 94 *U. S.*, 113. The State of Illinois, in its Constitution, had declared elevators public warehouses, affected by a public use; and had placed them under the regulation of the legislature. The legislature passed an act requiring, for a certain class of elevators, a license, and fixing maximum charges. Munn and Scott owned an elevator in Chicago, and carried it on in disregard of the law. They took out no license and charged rates higher than the legal ones.

The courts of Illinois sustained the Constitution and the action of the legislature under it. The case was carried to the Supreme Court of the United States. It was urged that this action of Illinois was in disregard of the provisions of the Constitution of the United States, which gives the regulation of commerce between the States to Congress; which forbids any preference of the ports of one State over those of another; and which forbids any State to deprive any person of life, liberty, or property without due process of law.

The decision of the Court was that, under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public welfare, the manner in which one shall use his own property.

The direction in which this power was in this case exercised was an unusual one, and was staunchly resisted by Justice Field, sustained by Justice Strong. The freedom granted under previous practice to individual enterprise availed more with him than the stress, under new circumstances, of a public necessity. Justice Field regarded the decision as breaking down a well established defence of personal liberty. He attached no importance to the declaration of the Constitution of the State that this form of business was to be regarded as affected by a public use. Long judicial usage had settled the nature of these economic transactions, quite beyond the affirmation or denial of any body of men. He did not regard it as within the competency of a State to fix the compensation which an individual may charge for the use of his own property in his private business, and for his services in connection with it. Such action was a blow, not simply at the obligation of contracts, but at the liberty of con-

tract. The conditions under which this was being done were not those settled by long-established usage, resting on special relations. He thus cast himself back on current economic ideas as opposed to any new social claims.

The decision of the Court in this case was a fruitful one, preparing the way for a freer exercise of the sovereignty of the State. It refused to bind the State by specified exceptions and a closely defined equivalence of circumstances. It left it to act under a parity of reasons in view of the public welfare. Any other view converts elastic ties into inflexible ligatures. In its unprogressive temper lies the danger of the judicial mind. Elevators in large commercial centres acquire, by virtue of position, much of the advantage of a natural monopoly. This power may readily be strengthened by combination. The charges made under these conditions may affect not only the persons subject to them, but may extend, in their influence, to the entire community. The possibility of commerce and the value of commerce are involved. Even if the distinction between this line of business and other lines of business is one of degree simply, yet the difference in degree is conspicuous enough to become the ground of diverse treatment. Certainly the new principle brings some doubt to business relations, and admits of a tyrannical application, but the old principle is here and now responsible for a grave evil. Nor can we expect to meet changing circumstances without encountering the danger of mistaken legislation, a danger certainly not greater than that of stubbornness and non-adaptation. The new issue is to be met with modified action. Between the two interests involved—the collective welfare guarded by the sovereignty of the State, and the individual liberty included within it—the former must

receive the first attention. The latter stands not for the ultimate end, but for the unoccupied areas left in securing that end. The State is not an aggregate of individual activities, but of these activities harmonized with each and made organic.

§ 14. The kind of charter which at one time threatened the gravest danger to the community was that of railroads. In the beginning, the several communities and States were only too anxious to secure railroads. They were ready to grant them every privilege and to render them unstinted aid. Railroading was a new experience. The people and the corporation entered upon it with no adequate sense of its importance, of the extent to which it was to determine, not only the general conditions of commerce, but of our productive life; or of the startling license it was to give to the individual; or of the restraint that it was to call for in behalf of the public welfare. The people were not awake to the immense power they were conferring. They did not understand their own action till they began to experience the great abuses that flowed from it. This inconvenience of a contract whose obligations were constantly coming in question and which was liable to put upon the State unexpected and inconvenient restraints in its sovereign function of supervision, led the Legislature of Massachusetts to pass a general law that all charters should be subject to amendment, alteration, and repeal.[1]

The controversy with railroads was brought to an issue by laws passed in Iowa and Wisconsin regulating rates. In the cases, Chicago, Burlington & Quincy Railroad *vs.* Iowa, 94 *U. S.*, 155; Peck *vs.* Chicago & Northwestern Railroad, 94 *U. S.*, 164; Winona & St. Peters Railroad

[1] Miller's *Lectures on the Constitution*, p. 536.

vs. Blake, 94 *U. S.*, 180, it was decided that railroads are subject to control as to their rates, unless they are protected by explicit agreement in their charters. In the Railroad Commission Cases, Stone *vs.* Farmers' Loan and Trust Company, 116 *U. S.*, 307; Stone and others *vs.* The Illinois Central Railroad, 116 *U. S.*, 347; Stone and others *vs.* New Orleans & Northwestern Railroad, 116 *U. S.*, 352, it was accepted as the settled doctrine of the court that a State has power to limit the amount of charges by railway companies. This power, if it can be bargained away at all, can only be lost by words of positive grant. The grant of the power to a railway company to establish rates does not deprive the State of its power to alter them.

§ 15. The struggle between classes in the United States has arisen chiefly from a sense of unfairness in the formation and administration of law, an unfairness resulting in very unequal opportunities, and in dividing lines passed with more and more difficulty. The doctrine of individualism, so fundamental with us in our social, civil, and economic convictions, uncorrected by collectivism, has resulted in a growing mastery by the few of the advantages which the people rightly look upon as their common inheritance. A sense of injury, oftentimes vague and ill-directed, has sprung up which tends to retard national development and to weaken the ties by which classes are knit together in one organic whole. The management of railways has played a prominent part in this growing controversy between the many and the few. Railways are in possession of a public franchise; they have received much aid from the people; they inherit the rights and duties of public carriers; their service frequently involves a monopoly, while upon its efficiency

and fairness the general prosperity largely depends. These circumstances make this branch of business peculiarly critical and responsible, affected in every part of it with a public use. As a matter of fact, no business has been handled with more license, or has given more unrestricted range to the irresponsible enterprise of individuals. It has evoked financial genius, yet a genius that has preyed upon the public. Stockholders and the people alike have fallen into the hands of managers who have made all interests submit to their own ends. In place of a fair, extended, and harmonious service rendered by the roads in their relation to each other, we have had ruinous competition and every form of unjust discrimination. When combination has been achieved it has had no permanent basis, no adequate recognition of all the interests involved, and no sufficient means of needful readjustments. It would hardly be possible to find an example in any other branch of business of like importance in which the management had been of so haphazard and changeable a character, with such extended losses to individuals and to the public, as the handling of railways in the United States. Speculation has been set no limits. Large fortunes have been gathered out of public losses; unequal terms have been given to the various lines of business; single enterprises, like the Standard Oil Company, have been built up, with enormous powers exercised alike against economic and social law. A struggle, therefore, for the correction of these evils which had grown up under the customary forms of business and the ordinary administration of law, became inevitable. The success of that effort is a matter of national interest and national development in settling the relation of classes to each other.

§ 16. The Interstate Commerce Law and the Interstate Commerce Commission afford an example of the way in which evils affecting widely the common terms of life have grown up, and of the painful and inadequate correction we have so far brought to them. Though interstate commerce is placed by the Constitution under the control of Congress, little had been done prior to the Act of 1887 in the exercise of that power, beyond a partial repression of the encroachments of the States on each other. The growth of railways in the United States has been a most active interplay of enterprise and accident, an example of undertakings involving wide interests left to submit themselves to narrow personal impulses. Railroads, when they came to supplement water carriage and to displace other forms of transfer, became at once, and in an unusual degree, a primary condition of prosperous production and trade. Ease, adequacy, and fairness in railroad traffic are the common grounds of prosperity. We congratulate ourselves on the multiplication of railroads, on the low rates of transfer, and on the striking development of individual enterprise in connection with them. In our satisfaction over this achievement we easily overlook the immense losses which have accompanied these gains. Never was a people more tolerant of failure. We listen to the congratulations of the successful and pay little heed to the lament of the more numerous class of the unfortunate. We overlook the unfavorable social changes which have accompanied this development of personal power, and the disturbance and waste it has brought to those sober, moderate methods which characterize the bulk of the nation. The interests of stockholders have been the plaything of adroit and unscrupulous management. Railroads, instead of

being built in wise extension of each other and in strict subservience to public wants, have expended a large part of their strength in anticipating, embarrassing, and weakening each other. Indeed, under the inapplicable notion of competition, we have regarded this wasteful conflict as a primary protection of the people, and when the roads themselves, weary of ruinous and fruitless strife, have been inclined to suspend it by an agreement, we have been disposed to force them back into contention.

Foresight in the construction of roads, the establishment of fitting relations between them, the assignment to each of its proper share in the common service, that settlement of connections and of rates by which each road contributes the most possible to the common prosperity and receives the most possible from it, have all been left to divided, capricious, individual enterprise, keeping in the foreground the immediate gain of the management. Sober and wide judgment, collective counsel,—where this counsel is most needed—the public welfare, have given way to a personal activity which has become a usurpation of power and an abuse of privilege.

By far the worst evil of this rapid, yet unregulated, development has been the degree in which it has set aside the common, open terms of business, and perverted its methods. Equality of treatment by the railroads, open terms of transfer, and a faithful response to the duties of a common carrier are essential in harmonizing the interests of person with person, class with class, community with community; in making the industries of the country universally successful, and in putting them in prosperous, yet peaceful, interplay with each other. Much store as we may set by individual enterprise, it loses much of its value when it is largely occupied in

making sterile the labors of others. In no way does tyranny more rapidly extend and mature itself than when the common terms and conditions of prosperity are left a prey to the few. Thoroughly as we may disbelieve in socialism, nothing throws us back upon it with more force than the perversion of individualism.

In the beginning, all parts of the country, feeling the absolute need of railroads, and having as yet no experience of their danger, were glad to concede to them every privilege and render them all possible aid. Few felt the need of restrictions or had the foresight or the courage to urge them. All were eager in the effort for the immediate extension of communication, confident that all other interests were involved in it, and would be readily developed out of it. Our errors are not to be charged on any one class. Our mistakes were a part of a development, a development that called out the agents through whom they were made. The enterprising manager became the unscrupulous manager, and laid hold of his opportunity as it grew under his hand.

§ 17. By virtue of competition, which we had been trained to look upon as the most comprehensive and beneficent economic law, and which we had distended by arts and tricks not of its own substance, every man in his business relations was matched with his fellow, and tugged and strained in all ways to fling his adversary as the only condition on which he himself could keep his feet. To this blind strife the railroads lent themselves in a very extraordinary way. Any considerable difference in rates is sufficient to settle the success or failure of many undertakings. Secret rates, rebates, overweight, underbilling, change in classification, free storage, and various favors were the means employed to aid one and embarrass

another in his calling. A man's business perished in his hands through influences over which he had no control, and of which he might be ignorant. His remedy, if remedy he had, lay not in a tedious and ruinous appeal to the courts, but in himself resorting at once to the same fraudulent methods. The railroads, having once abandoned their duties as public carriers, and entered on the sale of their services to the highest bidder, found themselves driven forward into ways ever more unjustifiable and unprofitable. They became servants rather than masters, and were involved in endless discriminations which were subject to no law, led to no goal, were attended with great losses, and scattered mischief in all directions. The most well-known product of this purely personal policy has been the Standard Oil Company, a monopoly that has been built up at the sacrifice of the common conditions of commercial activity, social well-being, and civic right. It stands forth a gigantic aggregate of every commercial evil which a free people, growing into national strength, ought to reject.

It was this wide-spread mischief and universal confusion that had grown up under our ordinary political and judicial procedure, which the law of 1887 strove to arrest. Immediate and adequate correction was beyond the power of man. All that was possible was a tentative effort which should slowly disclose the nature of the problem and lead to its solution.

§ 18. The chief purposes of the law were to correct excessive charges, unjust discriminations between different forms of traffic, between persons and between places, to facilitate the interchange of goods and passengers between different lines, to make each passage continuous from its commencement to its termination, to prevent

the charge of heavier rates for shorter distances on the same line, to stop the pooling of rates, to secure the publication of rates and changes in rates, to bring all traffic under the observation and correction of the Commission. Of these purposes, the most immediately important were the publicity and uniformity of rates. After these came the prevention of any excess in rates. The three fundamental demands in successful transportation are publicity of rates, uniformity of rates, and moderation of rates. The further requisitions find their value in their relation to one or other of these three.

A prohibition of a heavier charge for a shorter haul on the same line in the same direction, and the forbidding of pooling, both of which were prominent in the public mind, bear, in the statute and in the action of the Commission, upon these same points of equality and moderation of charges. Both prohibitions are justified, so far as they are justified, by their relation to these primary ideas of reasonable charges, well understood and fairly apportioned between shippers. The public has been chiefly afraid of pooling because of its overestimate of the doctrine of competition, and because it seems to be the most direct means to extortionate charges. As pooling always may be, and often has been, the most direct means to suitable and uniform freights, if it had been allowed, under the discretion of the Commission, the problem would have been much simplified. The prohibition of pooling, as an explicit and fitting agreement, has often thrown railroads back on those secret rates which have been the most difficult evil of correction in the entire problem. In the same way the anti-trust law has compelled the courts to dissolve traffic associations which held the germs of better things. No kind of action is more dependent

for its success on wise and concurrent methods than that of railroads. To perpetually throw them back on individual effort is to crush the crystal in the process of its formation.

The principle involved in the longer and shorter haul has been applied by the Commission in a conservative way, and in most cases has justified itself. It is a rule less flexible than the facts would seem to demand, but it lies so thoroughly in the right direction that even its arbitrary application is safer than its neglect. The courts have been inclined to accept with less rigor than the Commission the circumstances which justify its suspension. Those whose primary purpose it is to compare extendedly a large and varied class of wrongs, and to apply the remedy in a manner the safest for them all, are likely to adhere more rigidly to a general rule than those whose immediate duty it is to dispose satisfactorily of a single case. The methods of the Commission, taken as a whole, have served to emphasize the law in this particular rather than to weaken it. To express even approximately the natural advantages and disadvantages of each place in the freights conceded it, to leave each in secure possession of its own, with no trespass on its neighbor, is a work of utmost difficulty and will frequently involve some stubborn adherence to the rule, lest all directing power be lost in the infinite variety and confusion of the circumstances. Differences between two places which arise from water-carriage, the one possessed of such carriage and the other lacking it, have received more consideration than differences arising from the presence of competing railroads. This would seem to be just. The railroads have hardly a right to create differences and then urge these same differences as a ground of discrim-

ination. A port, by virtue of a natural advantage, may demand and secure a reduction of rates on a railroad competing with its water-carriage; but a place that is served by several competing railroads owes its power of reducing freights to the railroads themselves, and it is the abuse of this power which is the evil to be guarded against. It is felt to be neither just nor wise to allow the productive power of different localities to be determined by the capricious management of railroads. Greatly enhancing, as they necessarily do, the commercial opportunities of certain terminals, they may well be restrained from inflicting, by heavy rates, still further injury on way stations. This is a line of reasoning which railroads have been slow to accept. They have not understood how composite and how comprehensive a true commercial prosperity must be, how the complete success of any portion of it must ultimately depend on the highest success of every portion of it. They plead as a merit that they have built up by their concessions this place or this line of business. They may have done so, yet much of the apparent prosperity they have occasioned may have simply been a transfer from person to person, or from locality to locality, of advantages that might more desirably have tarried at home. Readjustments must be judged as much by what they pull down as by what they build up. An aggregation of interests is not a creation of interests.

We have in railroad traffic a repetition of the fallacies of protection. The shifting of wealth is not only not the creation of wealth, it delays, and may much embarrass, that creation. A change of railroad facilities is to business what a readjustment of levels is to water. In each case it gathers at different centres, but in each case there

are areas of loss as well as areas of gain. At few points do we more need an accumulated experience, stored at one ruling centre, than in this very matter of so adjusting natural and acquired advantages to each other through the entire nation that they shall most completely and permanently sustain each other.

§ 19. A great purpose of the Interstate Commerce Commission is to secure and apply this experience. The mistakes incident to this process are trifling compared with its ultimate gains. We shall best understand the successes and failures of the Commission by keeping in view these three desiderata: publicity, uniformity, and moderation of charges. The easiest to secure of the three, as well as the most necessary, would seem to be publicity. As a matter of fact this has not been found to be the case. Secrecy is so essential to all the diversity of rates sheltered under it, that it is sure to remain, no matter how often it may shift its method of concealment, as long as there is any unfairness to be covered up.

At the time of the formation of the Commission, any sense of responsibility to the public, any need of covering the whole field of transportation with concurrent methods, any feeling that a great franchise had been conferred which was to be administered in the interest of those who had conceded it, had passed into the background. This seems more surprising when we contrast the accidental and irresponsible ways of our railroads with the wide counsel and constant caution which characterize the administration of continental roads, especially those of Germany. An individualism that accepted no restraints but those of immediate personal interest, and often interpreted these in so narrow a way as to baffle the too eager management in their pursuit; an individual-

ism disguised as business enterprise and free competition, with none of the dignity or sobriety of a public service, ruled everywhere. Those least wise or least scrupulous in their management gave the terms which those more just or more circumspect found themselves compelled to accept. Public spirit and personal honor largely disappeared, as not consistent with the circumstances which govern transportation and which could not be changed by the action of any single person or company.

Not only were all the ordinary methods of concealment, special rates, rebates, in full operation; little confidence was felt in an explicit agreement between roads, and was not infrequently used as a cloak for further deception. When the pressure of the Commission began to be felt, unusual methods were devised to favor particular shippers. Bits of road were owned by them, and they were thus admitted into a disproportionate share of the common earnings. Free cartage and storage were allowed. Unequal terms—the essential feature of the old methods—were in one way or another restored, and the Commission found itself confronted by an evil that disappeared at one point only to reappear at another. The mischief declared itself and at the same time defied the remedies applied to it.

While the better portion of railroad managers favored the Commission, and rendered it much assistance, especially in devising a uniform method of accounts, which served to make the statements of the several roads more accurate in themselves, more apprehensible, and more capable of comparison, these helps lost much of their value by a constant relapse on the part of managers into evil ways that seemed forced upon them by the criminal evasions of the less responsible roads.

Not only was the field which all accepted as that of the Commission never brought into complete subjection; much that properly belonged to that field was excluded from it. Water-carriage, that often gave controlling terms to railway freights, proceeded on its way without constraint. Express companies and car companies, inextricably involved in interstate commerce, were left to their own devices. Roads lying wholly within a single State claimed exemption from the authority of the Commission, though they necessarily took part, in a greater or less degree, in interstate commerce.

§ 20. The Commission has been conservative in its administration. This policy is wise in itself, and was made necessary in the outset by the multiplicity and variety of the facts before it, by the lack of any accumulated experience as to the best method of handling them, by the great division of opinion among those whose interests were involved, by the perplexed way in which justifiable and unjustifiable transactions were interlaced, by the wide influence of those to be censured and constrained, and by the want of any clear public opinion, vigorous moral sanction, ready to support the principles which should be advanced. The right method was to be eliminated; the concessions and changes of method it called for were to be made, if not convenient, at least possible. The commissioners, the managers of railway traffic, and the public were to be educated into one concurrent apprehension of existing evils and of their remedies.

The Commission carefully avoided taking the position of a committee whose primary function was the detection of the evasions of the organizing act or of existing laws, and the punishment of these offences by ordinary pro-

cesses. The act itself was as yet too little understood, too incomplete, too insufficiently sustained by convenient and sound methods, to render an effort at rigid enforcement either feasible or desirable. The Commission claimed for itself, and hoped to win by slow stages, a truly administrative position. It was to become the great centre at which all the complex facts bearing on interstate traffic were to be gathered, to be made capable of easy and exhaustive consideration, and to be safely converted into rules of action. The principles involved in these complicated phenomena, at once like and unlike each other, were to be sought out, and a policy, pliable, yet proximately uniform, was to be shaped and grow into authority. The Commission has felt that, as an administrative body representing the entire community, it should so far have the initiative as to make its action authoritative, subject only to the correction of the courts under a definite complaint of injury suffered. It was a question of establishing more adequate and flexible methods, or of working exclusively under those which had already failed, and were sure to fail again.

§ 21. The good which the Commission has accomplished has lain chiefly along this line. The facts pertaining to railroad traffic have been spread out with greater fulness than ever before, and been put in accessible forms. Much valuable experience has been accumulated. The proper lines of advance have become visible. Much favoring sentiment has been created.

At length a critical point has been reached. An opposition, based on extreme individualism, profiting by existing confusion and wishing to retain it, stands in vigorous rejection of further progress. It is not easy so to arouse and instruct the public mind as to win from

Congress the needful expansion and completion of the organizing act. Our inbred jealousy of authority, no matter how needful that authority may be, is telling against the completion of the work of the Commission. A radical sentiment, also, which is satisfied with nothing but a public ownership of railroads, gives little support to a method so far short of its own purpose, though it is within reach and promises a great reduction of the evils of railroad management. It is easy to slip back from the position gained and lose the work already expended; looking on the entire effort as ineffective simply because we have not had the courage and persistency to complete it.

The upshot of the movement is of the greatest interest as going far to settle the relations of classes to each other, and to make possible fair terms for our common productive and commercial life. The rank growths which in the last thirty years have sucked up our commonwealth and overshadowed the general prosperity have struck their roots into the soil of secrecy, discrimination, and appropriation of public rights — methods which have found their grossest expression in railroad management. We are in close grapple with the evil of public resources turned from their proper purpose at this point of the government of railways, and our success or failure in the struggle will affect for a long time our adjustment of social interests to each other. Our temper and our skill are both in question.

§ 22. The chief success of the Commission to the present time, 1898, has been a better apprehension of the conditions under which its future efforts should be made. Its report of 1897 contains a full rehearsal of its recommendations, recommendations some of which have

been made many times, and which have the accumulated force of eleven years' experience. The Commission has from the beginning been between two millstones: the comparative indifference and inertia of Congress, responding to but few of its requests, and the conservative attitude of the courts, lending themselves reluctantly to the new measures. The theory of the courts has been that the Commission should appeal to them for the compulsory processes necessary to make its counsels effective. This dependence, closely construed, has tended to destroy its administrative power and to make it a body whose recommendations could be safely neglected. We are to bear in mind that all the confusion, arbitrary procedure, and injustice of railroad management have grown up under the courts; that the ordinary processes of law have utterly failed to anticipate or to redress these evils. Abuses notorious, everywhere present, were rarely brought before the courts, and still more rarely corrected by litigation. Shippers and managers fought out their quarrels as best they could among themselves, and few indeed resorted to the courts as a means of adjustment. Like speculators in a wheat market, or gamblers at a gambling table, they inflicted and suffered losses in silence. The law, with its uncertainty, cost, and delay, might be made a weapon of attack in the hand of wealth, but rarely a defence for the weak and the poor. An appeal on their part to the law was only the completion of ruin. If the Commission could do nothing more than take up afresh this disused and ineffective weapon of existing law, its fate was sealed.

Yet this method was constantly forced upon it. It found the greatest difficulty in achieving any independent position as an administrative body entrusted with a deli-

cate and specific duty. The difficulty was not that the results of its rulings were open to the correction of the courts, but that these rulings were a dead letter till the courts gave them life. This weakness became more and more apparent to those on whom the law was intended to be a restraint, and so its administration was constantly falling into that contempt which had been the lot of the ordinary restraints of law. It was to little purpose that the Commission pointed out existing evils when it lacked the power to bring them an adequate remedy. Those who were disposed to yield obedience to the new policy shortly found themselves thrust back upon the old discriminating methods, because the better principle lacked enforcement. On the other hand, those who had created confusion and found their pleasure and profit in it, discovered that they had only to shift, not correct, their practice.

The act itself was necessarily imperfect. It was thrust into too large and obscure a field to meet all its demands at once. Injunctions that were thought safe and desirable, like that against pooling, served as embarrassments. If these contracts between railroads, by which managers sought protection from a competition ruinous to all involved in it, were forbidden, they could the more justly demand that all secret rates should be promptly suppressed. The Commission was made a kind of common conscience in railroad management when much of that management was conscienceless. Much that it said and did was merely a higher law without the force of fulfilment amid the confusion of existing methods.

§ 23. One of the more vexatious difficulties which has come to the Commission has been its inability to secure testimony. The subject is presented in the Annual

Report for 1895, under the caption, "Hinderance to the Execution and Enforcement of the Law," and in the Report of 1896 under the caption, "The Brown Case." For the larger part of its existence this embarrassment has served to cripple the Commission. The Supreme Court, in the case of Counselman *vs.* Hitchcock, 142 *U. S.*, 547, in 1892, decided that any witness was excused from testifying before the Commission when his testimony tended to incriminate himself. This ruling effectually cut off the Commission from most of its investigations into secret rates, as the facts were unknown except to those who had taken part in them. This ruling was made though the 860th section of the Revised Statutes affirmed that the witness was not to be excused from testifying, and that his testimony was not to be used against him in any criminal proceeding. Congress, the next year, February 11, 1893, passed a more explicit act, requiring testimony to be given, but providing that no person so testifying shall be prosecuted for any transaction concerning which he may give evidence. In March, 1896, the decision in the Brown case was rendered by the Supreme Court, upholding the decision of the inferior court as constitutional, and affirming that the witness was bound to testify. The Annual Report of 1896 says:

"This decision seems to have effectually removed the embarrassments hitherto encountered in obtaining the testimony of unwilling witnesses in penal cases, while under it and the ruling of the Supreme Court in 1894 in the Brimson case, little difficulty is now experienced in securing the attendance and testimony of such witnesses in proceedings before the Commission."

Yet years were required to remove so simple an obstacle.

§ 24. A second embarrassment in the action of the Commission has been found in a different rendering by the courts and by the Commission of the word "line" in the short-haul clause. The Commission has been disposed to construe it as applying to roads which together constitute a complete line, though they might be under different management. The Commission, in accordance with the purpose of the act and the public want, have wished to constrain a united action of continuous roads, and a formation of rates subject to their actual relations to traffic. The courts were disposed to respect the rights of each company, and to limit the prohibition of the longer and shorter haul to each corporation taken separately. There is in this difference of opinion an instructive expression of the temper which naturally belongs to the courts, on the one hand, and to the Commission, on the other hand. The courts were disposed to regard as supreme the ordinary property rights of independent companies. The Commission put foremost its own function, the harmonizing of the action of public carriers with the public welfare.

In its Annual Report for 1894, on the 12th page, the Commission very pertinently remarks:

"That provisions intended to bring about general interchange of traffic with connecting lines on equal terms, and to compel the prompt forwarding of passengers and goods at reasonable rates, have been found so weak as to be incapable of forcing a railroad company to haul the loaded car of a connecting carrier at established local rates, and yet can successfully be invoked by a railroad company to restrain its employees from obstructing, or in any way interfering with, the prompt forwarding of interstate traffic over its own and connecting lines, is a condition of affairs which not plain people alo

but those supposed to be versed in the law, find it extremely difficult to understand."

Here, however, the courts and the Commission are coming to be more of one mind, as indicated in the case of the Wrightsville and Tennille Railroad, given in the Report of 1896 under the heading, "Discrimination between Connecting Carriers."

§ 25. The action of the courts which most has belittled the work of the Commission, making it well-nigh nugatory, has been the entire reopening of cases carried from the Commission to the courts. New evidence has been introduced and the previous work of the Commission has settled nothing. "The whole work of the Commission in a given case, however careful and exhaustive, and its decisions, however just and salutary in the public interest, may have only the most lame and impotent conclusion."[1]

Carriers have thus been taught that the Commission is a negligible factor; that they need make no serious and adequate defence before it; that they may defer their case till they are in the presence of the court with whom its decision rests, and whose principles and methods of procedure are those with which they have all along been familiar. A few lessons of this sort are sufficient to teach the refractory ones that they have little occasion for obedience to the new mandates, or ground of apprehending any severe rebuke for disobedience.

The true theory of the Commission would seem to be that it primarily represents the legislative branch; that it has a certain restricted executive power entrusted to it, that it is responsible to the legislature and can easily be held in check by it, that its commands, in the direct dis-

[1] Annual Report of 1895, p. 12.

charge of its duty, are as ultimate to the courts as those of the legislature itself, and that both it and the legislature are, through the action of the courts, under the restraints of constitutional law. Certainly a view of this sort is the only one which can prepare the Commission for the discharge of its important and difficult work.

"The experience of ten years has demonstrated the necessity and justice of such an act,—the Interstate Commerce Act,—and nearly every essential feature of that act has failed of execution. There is to-day, and there can be under the law as now interpreted, no effective regulation of interstate carriers." —Report of 1897, p. 37.

The delays incident to this absolute dependence of the Commission are altogether mischievous, and are sufficient of themselves to destroy the value of any aid granted by the courts. "The average duration of the cases which have been actually prosecuted for the enforcement of the orders of the Commission has been about four years." [1] The commands of the Commission, like the laws of Congress which they represent and complete, should take effect at once; the remedy for any undue extension of jurisdiction being left, as in all other cases, to the courts. Even then the movement would be sufficiently slow, but an injunction that is compelled to run the gauntlet of four years' litigation, and possible legislation, is no injunction—it is hardly counsel. The promised profits of four years of disobedience would quite compensate any losses that might accrue in the fifth year. Sufficient unto the day are the evil and the good thereof.

§ 26. The Commission in the Report of 1897, prese

[1] Report of 1897, p. 32.

the subject fully and argues it convincingly. It states and urges elaborately the amendments that are necessary to rehabilitate the original act, riddled and ruined by the decisions of the courts, and put the Commission on its feet. It is not true, but much the reverse of truth, that the courts are the most fitting body to define and enforce the terms of interstate commerce. They are accustomed simply to the redress of wrongs, not to laying down new lines of action in protection of the public welfare. Vested rights, so called, are likely to receive at their hands undue attention as contrasted with public interests which have not yet crystallized into distinct and defensible claims. The inherent conservatism of judicial principles makes itself painfully felt when new social conditions are approached. The Commission, on the other hand, in possession of a wide and ever-growing experience, lays down its rules of action, not in view of a single case or class of cases, but in view of the entire field; not to meet the claims of particular parties, but those of the entire community. This is well illustrated in the application of the fourth section of the act, pertaining to the longer and shorter haul. The Commission has insisted that competition between railroads simply did not give a difference of circumstances which entitled a company to make discriminations of rates against its way traffic to the extent of rendering the charges on it greater than those placed on through traffic. In the Troy case, 168 *U. S.*, 144, the courts sanctioned such a claim. But if this claim for discrimination is just on the part of the carriers, they themselves can indefinitely create the circumstances under which the fourth section suffers suspension; thus the prohibition is made void. They may commit a second wrong and justify it by an earlier one. They may make

through freights unreasonably low, and having done this, they may offer it as a ground for making way freights unreasonably high.

§ 27. The partial approximation of the courts and the Commission has been brought abruptly to a close by some recent decisions. In the case of the Cincinnati, New Orleans, & Texas Pacific Railway Co. *vs.* Interstate Commerce Commission, 162 *U. S.*, 184, it was decided that the Commission had not been invested with any power to determine rates. It is not empowered either expressly or by implication to fix rates in advance. In the case of the Interstate Commerce Commission *vs.* Cincinnati, New Orleans, & Texas Pacific Railway Co., 167 *U. S.*, 479, it was held "that the Interstate Commerce Commission had no power to prescribe a rate for the future, and that its power in passing on the reasonableness or unreasonableness of a rate was entirely confined to determining whether the rate had been reasonable or unreasonable in the past."[1]

Under this view, the Commission has scarcely the semblance of a function left it. If a shipper felt himself aggrieved by unequal or excessive rates, and wished the remedy of the law, such as it was, the courts were open to him. He needed no Commission to intervene. Now that it does intervene, its investigations have no authority. The Commission, under the ruling of the courts, though it represents the highest legislative authority, is left in the very presence of the wrong inflicted, powerless for its removal. The most it can do is to give moral encouragement to any suffering party seeking redress. The redress, when obtained, may be wholly inadequate, and may leave the future more than ever embarrassed by the resentments

[1] Report of 1897, p. 15.

and retaliations called out. In many cases, those injured have no claims which they can prosecute. In most cases, even if they have a legal claim, it is unwise for them to push it; nor are they willing to push it. If, in rare cases, the claim is carried to a successful issue, the general correction sought for by the act is not secured. No more striking example could well be given of adjudication which eats the heart out of the law it is called on to expound.

The Report of the Commission for 1897—the same can now be said of the Report for 1898—is a very important document, as it sums up the experience of eleven years, and presents fully the stage of helplessness into which the remedy for secret, unequal, and unjust rates has now fallen. The confused claims which now lie, under the Interstate Commerce Act, between the public, Congress, the Commission, and the courts, must be brought to some immediate and adequate solution, or a most needed measure of redress will fail of its purpose, and a deeper hostility of class to class be engendered. We have to choose between a relapse into the evils which preceded the act, evils which are driving us forward to the revolutionary measure of public ownership, and a reconstruction of the Commission along the lines indicated by it.

Few social questions are of more moment. It virtually involves a usurpation by powerful shippers and powerful carriers of rights and privileges which belong equally to all classes. Our national life thus endures an injury, our national interests show a rift, which will ultimately be driven to their centre by these perpetual strokes of the few at the strength and integrity of all. The last thirty years have seen in the United States a movement in this direction which, for rapidity, extent, and unexpected-

ness, it is difficult to parallel in the world's history. The wealth of Roman patricians, which led ultimately to the overthrow of the nation, most nearly approaches it.

§ 28. In no government does the judiciary exert a more controlling influence than in our own. We have much occasion for pride and satisfaction in the manner in which, for the most part, this service has been performed. Our method of expressing the mind of the people through written constitutions, and trusting the exposition and maintenance of these constitutions to the courts, gives them a commanding position in the government. The function of the judicial body as opposed to the legislative body is conservative. The courts expound constitutional law along lines which they have established, and it becomes with them a primary purpose to hold in check any movement which involves material change. This relation is the more manifest under the Constitution of the United States because it is so difficult of alteration, and because its present efficiency is due, in so large a degree, to eminent jurists who have sat upon the Supreme Bench. This inevitable, functional conservatism is increased by the interdependence and coherence of judicial principles, by the hold they gain upon the mind by habitual use, and by the many labyrinths which have been successfully threaded by means of them. The attention of the judge is directed, not primarily to the wants of the community, from which he has measurably withdrawn, to its changing circumstances, but to the beneficence of the system which it is his duty to administer. He is accustomed to a slow, coherent movement in which the ultimate results spring from principles as old as government itself. The thing that is, and the thing that has been, have necessarily a firm hold on his mind. But the thing that is, is the very

thing that society in its progress finds occasion to change. It is anxious to restrict vested interests, to subject them in some new way to the public welfare. The law has shaped itself inevitably more to the interests of property than to those of persons, to the wants of the wealthy than to those of the poor, to the feelings of those in the control of the state than of those who are suffering its control. Those who have power shape power to their own uses.

When, therefore, fresh social problems, like those involved in the labor movement, come before our courts, they have no precedents and few sentiments suited to them. Hence the bench easily becomes a barrier in the way of progress; it can hardly fail to be a barrier unless some judge is found of extraordinarily comprehensive and constructive powers. Thus, in that long struggle in England —a struggle in which she has preceded us by many years —in which the workmen have won the freedom of collective action, the courts have with great uniformity been opposed to them. Any united effort on their part was summarily repressed, while the concurrent action of employers was passed by.

The legislature, on the other hand, comes directly from the people, has their immediate wants and wishes in view, and is charged with this very mission of correcting prevalent methods. While we need in no way disparage the conservative function in the State, the radical function is still more difficult to fulfil, and one which imparts to conservatism much of the value that belongs to it. If there are no motion and no tendency to motion, inertia loses its purpose. It is thrown in to make movement firm and uniform.

It is of the utmost moment, in the balance of powers

which constitutes the distinguishing feature in the mechanism of our Constitution, that the function of the legislature be in no way impeded or usurped by the courts, that the two hold on together in their mutually corrective parts. In the case just alluded to, it was by the action of Parliament that the workmen, in 1875, at length won the freedom of collective action. An effort not criminal in itself was no longer to be made criminal by the fact that several were united in it. It was with some difficulty that collision was avoided in Reconstruction between Congress and the courts. On the whole, the better opinion of Congress—the opinion which grew more directly out of the changed conditions—prevailed. The courts are slow to catch the reformatory temper involved in legislation, and still slower to lend themselves to its successful expression.

§ 29. We have given an example in the Interstate Commerce Act of a legislative intention brought to nothing in a short period by the inertia of the courts. It will hardly be denied that a tyranny of the courts is perfectly possible, and has at times been, in the history of England, a disastrous fact. Government by injunction, to which the public attention has been repeatedly directed of late, offers an example of an abuse of power. This action of the courts has been one-sided in its operation, has deepened class divisions, and has evoked bitter resentment. Workmen have felt that the courts were a facile instrument in the hand of their adversaries. A failure in the courts to apprehend the conditions of social development and to be governed by them is more difficult to bear than unwise legislation, or corrupt administration. Recourse may be had against these to the bench, to those whose duty it is to review action and bring it into har-

mony with fundamental civic principles. But if judicial action is misdirected, if it becomes the expression of a stubborn conservative temper, if it gives some new extension to that temper, there is no further appeal. The foundations are out of order. The seat of even-handed justice is usurped by a partisan bias. The public conscience is thus perverted, the national life is turned aside from its true unfolding, and a confusion appears for which there is no remedy short of revolution, the probing of men's thoughts to the depths of primary principles.

A court is necessarily armed with the power of self-protection. It cannot suffer injurious affront, or allow its processes to be neglected, or its purposes to fail. It must have power, whenever any of these evils appear, to arrest them. This is self-defence. The safety of its own movements must be assured as the condition of doing what is committed to it. Hence the courts can inflict summary punishment on any action which interferes, either immediately or remotely, with their own procedure, any action done in contempt of their function. They may thus arrest any action which tends to make the results of the prosecution pending before them profitless. Neither of the parties to a suit can be allowed to anticipate the judgment of the court by appropriating or reducing in value the property under discussion, or in any way rendering nugatory the verdict.

It may also be the purpose of a legal complaint to prevent some action in injury of one's interests, as the diversion of a stream, building a dam, taking possession of a street. The prosecution may thus end in an injunction, in arrest of a contemplated injury. Plainly, however, a mode of action designed to protect the court, fulfil its purposes, and give a needful extension of its action in its

own well defined field of redress, is not to be employed as a means of trespassing on the legislative department, and making that criminal which would not otherwise be criminal.

§ 30. It is perfectly easy for a court to give its injunctions the character of legislation, extending them to some action not in itself under the censure of the law, and then by a summary punishment set aside the constitutional right of trial by jury. The law is thus made, interpreted, and enforced by the same person or persons in a manner that admits of no discussion or redress. No absolutism could be more complete or rapid than this; no usurpation more inadmissible. When Debs—*In re* Debs, 158 *U. S.*, 564—and others not designated were enjoined not to do certain acts, and were afterwards punished for disobedience, the court became at once a legislative, judicial, and executive body. This inevitably follows if a court, by injunction, enters the field of police and criminal regulation, and undertakes to define the relation of persons and classes to each other in their personal rights.

Hence arises the just limitation that an injunction is not applicable to criminal cases. The court has no occasion to forbid an action that the legislature has already pronounced criminal, and no right of its own bent to declare that criminal which the law has not held to be criminal. The acts under consideration in connection with Debs and his associates were acts which the law of England had for long regarded as criminal, and had only recently removed from that category. The line of division may, at times, be obscure and easily passed, yet the protection by a court of its own judicial power is quite distinct from the assumption of legislative direction in the complicated field of social rights. The op[illegible]

a special inquiry, under definite facts, and well recognized judicial principles, into a case between distinct parties before the court whose property rights are in question; the other looks to a definition of what is and is not admissible in action under the changeable and complicated claims of our social life. A question of this sort calls for the widest consideration of all interests, immediate and future, secular and social, and their sympathetic reconciliation. This critical and constructive work lies in the province of public opinion and legislative enactment, moving tentatively toward the public welfare. A court that undertakes by injunction to anticipate and settle the relation of classes because of, and by means of, some pecuniary interests involved in the conflict, much misapprehends its true function.

When the court in the case of Debs gave a general prohibition resting on unknown parties, and followed it up with summary punishment, as it did, it committed a distinct trespass on the legislative function, and with a flagrant disregard of a leading constitutional right,—the right of trial by jury. This usurpation was so radical as to render this safeguard wholly inapplicable. We cannot often look to our courts for progress. Their function and their tendency are conservative. We ought not to find them pressing close up to, or passing, their own proper bounds to check or countervail those progressive changes on which our social prosperity must ultimately depend.

The Constitution of the United States, with much care and reiteration, protects the right of trial by jury.

"The trial of all crimes, except in case of impeachment, shall be by jury." "In all criminal prosecution the accused shall enjoy the right of a speedy trial by an impartial jury." "No

person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." "In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."

These safeguards of the Constitution are all evaded by the device of an injunction; and this in a class of cases which involves the utmost division of public opinion, an absolute denial on the part of many of any wrong-doing, and a distinct taking of sides by the court in a social controversy. The misuse of the injunction is the more obvious from the fact that it has never been used in defence of workmen, whose losses, grievances, and weaknesses are more conspicuous than those of employers. This use would seem to come under not one, but all, the restrictions laid on the injunction: it is "not to operate oppressively"; it must be "a fit and appropriate mode of redress"; it must "not be liable to work an immediate injury."

§ 31. The circumstances which attended on the strike at Chicago, in 1894, are greatly to be regretted, and have carried with them widely distributed evils. The final effect on the public mind was a sense of failure in efforts and sacrifices meant to be socially corrective, an arbitrary planting of the foot of power, an assertion of invincible force in things as they are, whether for evil or for good. The General Government made its military as well as its judicial power felt with a precipitancy and absoluteness that promised little for popular liberty. The masses have such odds against them, make so many mistakes, and fight so losing a battle, that our sympathies are profoundly moved by their failures, even when those failures are in-

evitable. One forgets, when in the presence of authority used with indifference and assumption, that the cause of the people must be made good by patience, self-restraint, and wisdom; that only thus can it become the cause of society. Events which roll one more blind, desolating flood over fields that are beginning to show the germs of a more generous and diffusive life, are fearful repressions of hope and provocations of passion. They seem to shake, like an earthquake, the most massive structures of our national strength.

It is strange how criminal become the combinations of the weak in the eyes of those who have necessitated these unions by the thousand and one ways in which they have gathered opportunities and powers into their own hands, and assiduously framed law and custom in their own defence. We are by no means rid of the feeling, once so dominant, that the union of workmen in pursuit of their own interests is treason to society. We can hardly frame a law against trusts without finding its earliest application directed against some innocuous combination of workmen. We hate any restlessness of the mudsills. There still lingers in the dominant class the dogma of the divine right of kings. The strong are strong, the rich are rich, by divine appointment. Any effort to redistribute advantages, to reconstruct society, is a rejection of preordained laws. So it may be, but so it is not necessarily. It is a patient, painstaking task to untangle the knotted skein of social relations, and lay its threads once more side by side with each other.

§ 32. It is not alone in defining the conditions of social order that the judicial mind has been found unduly conservative. We have met with the same difficulty in the apportionment of public burdens. Hitherto the larger

share of the cost of the government has fallen on those who receive the least from it. The principle of contribution according to ability has received little recognition. A notable illustration of this failure to proportion taxation to the power of the citizen was furnished by the decision of the Supreme Court in connection with the income tax.

Wealth, the form of power most coveted in the United States, has begotten the usual grasping temper which accompanies success. Not only have the wealthy shaped the laws, and used existing laws, in a way to favor their accumulations, they have assiduously and successfully evaded their share of the public burdens. The lower middle and the lower classes, if we arrange men roughly according to their wealth, are taxed beyond all proportion more heavily than the upper middle and wealthy classes. The taxes imposed by the General Government have especially tended to this result. They have not only been laid on consumption, they have discriminated against the consumption of the many, and, by the protective character of the duties imposed, have compelled an additional contribution for the benefit of the producer. Taxation has thus been the means of a large annual transfer of resources from the many to the few, from the poor to the rich. The income tax of 1894, rendered remarkable by the decision of the Supreme Court—Pollock *vs.* Farmers' Loan and Trust Company, 157 *U. S.*, 429—was designed expressly as a partial correction of this inequality. It laid a tax on incomes in excess of $4000, exempting savings banks, building and loan associations, and mutual insurance companies. It was intended to shield those already unduly taxed, and to reach those escaping taxation.

The animus of the decision was shown by the fact that

the court, evenly divided, was able to give no opinion on the three fundamental questions, whether the portions of the law pronounced void were such as to destroy its validity, whether, as a direct tax unapportioned according to population, it was unconstitutional, and whether it was void from want of uniformity in its application. The court was evenly divided on a rejection of any income tax as unconstitutional, and by a bare majority succeeded in rendering worthless the act before it. The theory which underlay the decision and secured an adverse judgment, rested on a new principle, the permanent rejection of an income tax by the General Government.

§ 33. The Constitution of the United States gives unlimited power of taxation to the General Government, with one exception and two restrictions. The exception is a tax on exports, and the restrictions are that duties, imports, and excises are to be uniform throughout the United States, and that direct taxes are to be laid in proportion to population, estimated by adding to the whole number of free persons three fifths of those held in bondage—the " all other persons " of the Constitution.

The income tax was attacked before the court on three grounds: as not uniform, as not apportioned, and as resting on income derived from public bonds. The last of these objections calls for little consideration. The general policy of the government, as interpreted by the courts, has been to exempt from taxation all forms of government bonds. The taxation of public bonds, whether those of the States or of the United States, would simply be an embarrassment of public powers. The sums gained by such taxation would be lost again by the higher rates under which the loans would be made, the administrations of the general and of the local govern-

ments would be involved in annoying conflicts, and would waste strength in gathering revenues which would disappear again amid the additional difficulties attendant on fiscal measures. The exclusion of income derived from public bonds would have left the law unharmed.

The attack on the law as disregardful of uniformity and of apportionment, went to its substance. The primary purpose of the requisition that duties, imposts, and excises should be uniform throughout the United States was to prevent discrimination between the States in imposing public burdens. The act under consideration was not faulty in this particular. If we give the limitation the largest rendering which equity in taxation calls for; if the uniformity means uniformity between persons as well as between States, still the law was not objectionable. Taxes must fall upon certain classes, specified occupations, and given kinds of goods. It is of the substance of taxation to discriminate. All the uniformity possible is that all persons belonging to the specified class shall be included, all goods of the sort named be covered by the tax. In defining the classes and goods on which the tax is laid, the legislature has the utmost liberty. It may and does select its objects of taxation on many slight and secondary grounds, grounds that would have little force aside from the purposes of taxation. This liberty of the legislature is to be judged broadly, by the relation of part with part, burden with burden, in the entire field of taxable things; and also by the ease and certainty with which the revenue aimed at can be secured. There is here much ground for criticism resting on fitness, very little for criticism resting on legal right.

The act under consideration was an effort to secure

something like uniformity in taxation, not an act in disregard of uniformity. The exemption of all incomes less than $4000 was made on the express ground that those whose incomes were less than this sum were paying decisively more relatively than those whose incomes exceeded this sum. The law was designed in part to correct this inequality. The notion of uniformity was of its very substance. The contention that no exception should be made in incomes was judging the law by its letter and not by its spirit; by what lay upon its face and not by what it was intended and fitted to accomplish. The justification of the law was found in the very principle under which it was sought to condemn it.

§ 34. The contention concerning apportionment was the central point of attack, and that which, in the final judgment, made the law a wreck. The Court decided that a tax on income derived from land was a direct tax in the meaning of the Constitution, and could not be laid otherwise than by apportionment. As apportionment was impossible, the tax thus became impossible. An income derived from land furnishes an obscure part of many, if not of most incomes; the decision therefore left the law in a shattered and unserviceable form.

We should see two things, the practical results of the decision, and the methods by which it was reached. It has greatly limited the power of the General Government where above all it should have a free hand,—in the matter of taxation, in securing adequate revenues, and at the same time a just division of burdens. The custom of the nation, the ease of collection, and the doctrine of protection have made duties and excises the chief source of revenue. The only considerable tax that was likely to be imposed lying in a new and corrective direction was an

income tax. Such a tax under the present decision is no longer feasible.

The very idea of equity in taxation has been thrust aside in thrusting aside the only means by which it was likely to be reached. The rich are allowed to escape the burdens which properly fall to them, and the poor are forced more and more decisively into the servitude of excessive taxation. The system of indirect taxation, which lends itself so readily to all species of favoritism, to building up this and that form of production, has been made the necessary and almost exclusive method of the General Government. No power of correction remains to it which will materially alter this maladjustment. One may not attribute motives, he must judge facts. The decision of the Supreme Court has set up a most unexpected and undesirable bulwark of defence around the rich in their relation to public burdens. Permanent exemptions have been established which destroy the equality of classes.

The considerations in connection with which this disastrous conclusion was reached were equally faulty with the result. The question of what was to be understood by a direct tax, subject to apportionment according to population, had come at an early period before the Supreme Court—Hylton *vs.* United States, 3 *Dallas*, 171. It was seen at once that the word direct had not been used with any very exact meaning. It was unanimously agreed by the court that the limitation was not intended to suspend the power, but to determine its manner of use. A rendering, therefore, of the restriction which took away from the national legislature the right to lay certain taxes was at once rejected. The limitation was to give way to the power when the two were in conflict;

not the power to the limitation. If, from the nature of the case, the restriction was inapplicable, then it disappeared, and the power remained untrammelled.

The only two forms of direct taxes to which apportionment was applicable were seen to be a tax on real estate and a poll tax. These two and no others were henceforward held to be subject to this provision. Thus a sensible, straightforward principle was established, and the Constitution was cured of its defect of expression with the least possible injury and the least loss of power. For a hundred years this interpretation had been accepted. An income tax had been repeatedly imposed, and had been recognized in judicial action. Springer *vs.* United States, 102 *U. S.*, 586. Between the years 1861 and 1870 nine acts had laid or modified an income tax. No precedent could well be stronger. Yet the thing complained of is not so much the modification of a well-established principle, as its modification against equity and the public welfare; its modification so that those already escaping their obligations to the government might be protected in the position they had won. It is not easy to find another decision which so openly departs from the law in order to shelter privilege.

The technical ground on which this was done was that a tax on income, derived from real estate, is a tax on real estate. A logical relation is thus made to push aside a plain, practical fact, that had long been accepted, and this with no other result than to embarrass the government and restrain it in the pursuit of justice. An income tax as a tax,—the only relation in which we have occasion to consider it—is wholly distinct in form and in substance from a tax on real estate. Its relations as a tax are quite its own, and it carries with it as significant and

beneficent results as any tax whatever. If we were to divide up an income tax according to the sources from which an income is derived, we might dissolve away its own characteristics and assign it a great variety of forms and qualities. If the income arose from traffic, it would assume the character of a license; or if the trade were foreign trade the nature of a duty. If it were derived from production, its effects would be those of an excise. Against this subtle reasoning, shaped to sustain an object, there remains the simple fact that an income tax, a tax of its own order with its own results, had been repeatedly recognized, and was able, in a high degree, to subserve the public welfare.

Another consideration of much moment is that the limitation on direct taxation in the Constitution was part of a compromise. The apportionment was not demanded on account of any general principle in taxation—was not the ordinary apportionment according to population, but was a special apportionment by which the burden was divided in a given way between slaveholding and non-slaveholding States. When the decision of 1894 was made, the grounds and occasions of this compromise had wholly disappeared. The clause of the Constitution had lost its significance. The interpretation, therefore, which it had borne for so long a time, and which had rendered it innocuous might well have been let alone. To revive this effete question for ends entirely new and mischievous was an action as much aside from the real purposes of the Constitution as it was in itself illegitimate. The original purpose was partly to shelter slave property and partly to bring it under taxation; a definite ratio was settled between the two sets of States. The purpose to which the Supreme Court has very unexpectedly put this

limitation, the remainder of an outgrown controversy, has been to shift the burden of taxation permanently from the rich to the poor, from ability to pay to the necessary expenditures of living. Whatever may be thought of the first intention of the limitation, it can hardly be censured as severely as this its later use. The offensive provision has been made more noxious in its death than in its life.

CHAPTER VII

Conclusions

§ 1. In estimating the results of something more than a century of national life on the growth of nationality in the United States, we need to remind ourselves of what is included in nationality. It stands for the sympathetic activity of a people in every portion of it in the pursuit of their common prosperity. The social, commercial, civil, and intellectual life of the nation becomes one freely participated in by every citizen according to the capacity which belongs to him.

The first obstacle to this unity of sentiment, at the time of the formation of our government, was the narrow provincial life led by the several colonies. This gave rise to a restricted policy and to unreasonable prejudices. This difficulty, though it seemed formidable, and for a considerable period occupied the foreground, was not so serious as it appeared to be. The divisive influences it stood for were sporadic, changeable, and sure to give way before the progress of events. The whole movement of civilization was in reduction of their power. The rapid development of commerce and of social life could not but overcome them. We may say that these alienations of ignorance and self-assertion have almost wholly disappeared. The General Government is far more in danger of unduly overshadowing State authority than of itself being overshadowed by the States. We

need to exercise our watchfulness on this side rather than on that in preserving the admirable balance between local and central government which the force of circumstances, rather than conscious devices, has conferred upon us. We are no longer in danger of vertical cleavage, parting us like drift-ice into insignificant blocks. This result may seem the more surprising when we remember the wide and continuous stream of immigration which has poured in upon us. We have, at times, regarded this danger as greater than it has proved to be. This flood of population has been scattered widely through the States, and so has somewhat strengthened the unity between them. A consideration of more moment is, that it has helped to enlarge that productive and commercial movement which has devoured us all alike. The material to be digested has become as food quickening the digestive process.

§ 2. The second great danger which our national unity encountered, and one far greater than the earlier one, was the formation, in each of two distinct and extended sections, of a type of social life in inherent conflict with that of its fellow. This evil, far from decreasing with the progress of years, steadily gained ground, and, to the surprise of many good citizens, showed more and more an implacable character. This occasion of division came, in due time, to the arbitrament of war, a war so thorough and exterminating as to root up and sweep away the institution which had been its occasion. It has left behind it a somewhat obdurate race problem, but one that concerns more or less all sections of the country. It takes on, it is true, much more intensity in the South than in the North, yet both North and South are interested in much the same way in its ultimate solution.

A servile class in the South would embarrass both it and the North. A proximate equality in the conditions of production in the two sections is of great moment to both. The one method of equity is equally the prosperity of both. There is in this remainder of slavery a ground of irritation, but not of national division. Nowhere in the broad area of our country is there arising any such fundamental diversity of interests between considerable sections as to be the occasion of alarm, much less of any effort looking toward separation. All sound constructive forces are on the side of national life. We are in no danger of breaking asunder by the weight of distinct parts inadequately bound to each other.

§ 3. The third embarrassment—an embarrassment rather than a difficulty—in our national life has been indicated as arising from the interior federal character of our Constitution. The three departments have been planted side by side with the expectation that they would mutually support, supplement, and check each other. On the whole, they have done this, and have done it increasingly well. If we were to compare the administrations of Jefferson and Madison with the political movements of our own day, we should see that the several departments are more, not less, concurrent than at the beginning. The comparative peacefulness of our national life has favored this result. There has been but little occasion for the strain of diverse policies in departments sustained by a divided public opinion. This evil appeared in the critical period of Reconstruction, but passed by with no permanent injury. The unity of a government ordered under this idea of separate departments with mutual restraints must be found in the unity of the people, in a vigorous public opinion at union with

itself in essential points. The general growth of nationality has furnished us with this public opinion, and the several wheels of government, driven by firm and uniform forces, have revolved in quiet harmony. An occasion of strife would doubtless appear at this point, if our national prosperity should forsake us; if our contentment should disappear, and the bitterness of divided opinion overtake us. The separation of departments only becomes mischievous, when it rests back on a corresponding division of sentiment in the people.

§ 4. While these earlier grounds of dissension have been met and removed, there has arisen, without observation, a danger greater than they all, one which has hitherto been the pre-eminent dissolving force in the life of nations, and one that is likely to be a fruitful source of trouble with us for years to come, a contention among classes as to their respective rights in the State. This is not a vertical, but a horizontal, cleavage. It stands for those innumerable laminæ which disclose the planes of pressure in what was once the solid and homogeneous rock, and which prepare it for rapid dissolution under the attacks of the elements.

Our Constitution, jealous of all class distinctions, was careful to forbid both to the General Government and to the States the conferring of any title of nobility. It is not to be supposed that the national temper which prompted this prohibition will willingly accept a distinction of opportunities among citizens compared with which a title of nobility is a mere bagatelle.

For the past few years, deep and wide differences have been in the process of formation between classes as regards their terms of participation in the public welfare; differences by no means inherent in the nature of the

case. The forms in which they have expressed themselves have been these; favoring by protective law one and another form of production, as those interested in them have won the legislative ear, with no plain reference to the public welfare; allowing of various franchises to be appropriated by private persons; unequal advantages extended by public carriers to the several portions of the community; the corruption of political life and the abuse of political power by the use of wealth in securing and protecting these class privileges; the unequal distribution of public burdens in taxation. These are all definite, undeniable, and weighty expressions of a growing tyranny of classes, which subverts our liberty in a most radical way and endangers our national unity. It has found support in the stolid, opaque selfishness of the commercial sentiment so prevalent in English and American communities; in an extreme individualism; in misapprehended economic principles, and in that tenacious hold on power which those who have once won it are sure to manifest. While, in a general abstract way, the ruling classes will admit the necessity of reform, of a constant and progressive unfolding of society, they fail almost wholly to see the points at which this is to take place. They deprecate change the moment it brings new adjustments to existing relations. They feel that reform, like a funeral procession, should take its way through back streets and not along crowded thoroughfares; yet it remains true that the reforms most pertinent to our commercial life must thread thoroughfares, must affect the fortunes of the most numerous class of our fellow-citizens.

§ 5. A fact which greatly embarrasses us in any adequate adjustment of the interests of the several classes to each other under the public welfare is that the com-

mercial temper has forced its way into politics, and there, by the agency of the political boss, holds riotous sway. The legislature, the tribunal to which the people take appeal in their social and civic conflicts, has far less of the discriminating and progressive temper which can alone apprehend and render justice than the case demands. This is illustrated in the lame way in which the Interstate Commerce Commission has been left to struggle on with insuperable difficulties. A legislature that has innumerable ends of its own to be made up and pursued in the midst of public interests is a weak instrument of reform. With this edgeless tool the people must put to the more strength. Our legislative halls have been in part captured by the very commercial forces that are to be restrained. This fact adds much to the confusion and ferment of the public mind.

Nor are we altogether fortunate in the second refuge of justice, the judiciary. In nations which lay so much stress upon law as do the English-speaking nations, there is no more fundamental condition of concord than the feeling that the law will be interpreted and applied in behalf of the public welfare; that the spirit of justice will scatter all its subterfuges. Equality before the law must mean equality in privileges, rights, and duties. The judiciary must be the conscience of the nation, discerning the true conditions of national growth, and settling the relations of citizen with citizen, of class with class, exclusively on the basis of the public welfare. The conviction that this function of defining rights, ever in a more absolute and exact form, is being performed by our courts, imparts to our national life buoyancy and strength. Any feeling that there are blindness and prejudice in this central shrine of law, where interests are weighed with each other

with a wide forecast of the future, and rights and justice defined under the soundest and most significant principles, involves a fatal loss of confidence in the institutions which bind us together as a nation. We need just now to recover a more absolute sense of wisdom in the oracles of law.

The American people will never become wholly ministrant to each other till they feel that the laws are framed and administered with reference to the public welfare. Thus growing intelligence makes this ever a more imperious demand While a plutocracy is increasingly enfolded in the drift of events, the unity of national growth becomes less and less possible to us. It is in these minor organic functions that our national life is now struggling for a healthy civic expression, which shall give harmonious play to all persons and parts in the social body, making them members one of another. Civic forms can never be treated successfully aside from the vital impulses they enclose. Our justice must address itself to the thoughts and the feelings alike of all classes and conditions of men. Our national life is the life of the many.

§ 6. There is hardly a contrast more unexpected and more wounding to our national pride than that between the political history of England and of the United States during the present century. Misrule, political corruption and irresponsibility have obviously been on the increase with us. The social adjustments, the distribution of power and opportunity, which are associated with political institutions, have become more unfavorable. Liberty has failed to fulfil the promise of a growingly prosperous and harmonious national life.

In England, on the other hand, political action has gained ground in purity, in its power to keep adequate

ends and able men in the foreground, in a readjustment of political rights and extension of suffrage, in the union of the people and Parliament, and in the growing rapidity and precision of response between the ruling body and the wants of the nation. The parasitic presence of conventions and caucuses, and bosses has been escaped, social conditions have become more equal, and the rights of all classes have found better reconciliation. The labor movement, as an example, is many years in advance, in the correction of public sentiment and of law, of the same movement in this country. What are the causes of this marked distinction ?

On the continent, parliamentary government has been embarrassed by a multiplicity of factions, so extreme in their convictions and so bitter in their feelings toward each other as to be unable to combine in any permanent policy. In the United States, there has been such a welter of democracy, that the one contention of the two parties, divided with difficulty on the ground of principles and distinguished by an ill-defined and wavering diversity of temper, has been for power; which each in turn has abused and has lost with the accomplishment of no important purpose. There has been no sufficient steadfastness, no such distinctness of aims, in either of the two parties, as to restrain them from corruption when in power, or as to enable them, when out of power, to put a restraint on their opponents. The cry of failure has been flung backward and forward, with little discrimination or damaging force.

In England, on the other hand, each party has advanced good government; or, failing of this, has quietly yielded to its competitor. The movement has been constantly one of weighty interests, and of sustained effort

in their behalf. What a surprising political record is implied in the fact, that one man, characterized by sincerity and honesty, has been for sixty years of parliamentary life, an ever-increasing exponent of national politics. We can show nothing approaching to it. Our politics, during all the latter portion of this period, has been an ever deepening, widening, and more confused interplay of political management and personal interests. "Franchises to the use of streets and highways, the grants of rights of way, concessions of charter privileges, legislative sanctions to corporate undertakings and lucrative usufructs of various species of public wealth, real estate development in connection with municipal improvements," concessions in taxation, uncorrected abuses in the use of public franchises, and corruption in gaining and using power have all been present in wonderful vigor and variety in our public life.[1]

It is becoming more and more a theory of those who are striving to take a hopeful and philosophical view of our confused and embroiled politics, that partisanship holds in itself the correction of these evils, that it must, by its own activity, purify itself. This view would seem to be mistaken, and in some aspects self-contradictory. While the ideal notion may not be workable, that a free country can be ruled by men chosen for their fitness to perform public service, and that these public servants can be guided in their duty by a constant recognition of immediate national wants, it is equally true, that no government, based simply on the antagonism of parties, pursuing in a fluctuating way the ends of power, can yield a growingly satisfactory result. Bad as our politics now are, they still embrace many men who cherish some idea

[1] *The Rise and Growth of American Politics*, p. 318.

of public service, and who revert to it in action when the circumstances make this possible. The political broth may have been concocted and boiled in the cauldron of witches, and yet it contains some salt. This good, be it less or be it more, is always in contention with simple partisanship. Partisanship can never reconcile and combine in a desirable government all the conflicting interests present in the community. This reconciliation must take place along lines of justice, and cannot be accomplished as a mechanical equilibrium of opposing forces, or as a tricky adjustment of claims accepted according to their immediate political value. The politician employs one interest and eludes another according to no principle; he does not see their true lines of union. Passing through one struggle, he gains no ground, stores up no knowledge, but encounters the next set of circumstances in a purely empirical way. His successes and his defeats do not take hold on each other in any vital and coherent fashion.

Partisanship is sure to overestimate the more malign, and underestimate the more benign, influences. The more objectionable the political end aimed at, the more certain are its advocates to pursue it in an exacting way, and with slight recognition of political obligations. These obligations bind those who wish to improve the political outlook, and have no strength with those indifferent to it. Partisanship is simply a method of subjecting the good to the evil. It is a blind conventionalism, available chiefly with the sober citizen, by which the political boss retains his power. In the adjustment of political forces, partisanship always favors those least amenable to reason. It gives the unscrupulous man a growing advantage over the scrupulous one. It springs out of corruption and enhances corruption.

Our politics owe their deterioration to the fact that no important and opposed social interests have for a long time appeared in them. The predominance of neither party produces any decisive change. Victory here or victory there only shifts the causes of irritation. During the slavery controversy, strong men were kept in the front, and oftentimes men of remarkable moral tone. The nation was led by its leaders, and a discussion went forward which was in a high degree stimulating to the public mind and heart. The one difficulty in this period, in itself one of national development, was that the social and political interests involved were irreconcilable, and so incapable of reaching any higher point of union. Increasingly our political parties have lost social affiliations. No permanent and pushing social interest has been embodied in them. They have both lent themselves, and almost equally, to the predominant commercial temper, which has had undisputed sway since the Civil War. The forces expressed in corporations and trusts have harnessed either party, as occasion offered, to their heavily loaded dray, and have been content to pay one team or another, or both, if they were at liberty to drive on. There has been no social problem which has engaged political parties. They have given themselves to the pursuit of power, and the use of power for ends of power. Intrigue even has gained no character and lost no character in passing from one party to the other. The means of organization, the convention, the caucus, the boss, have become ever more important, as on the skilful use of them depends success. To regard this process of political decay as self-regulating, as a slow circuit by which we return to a sound mind, is absurd.

We approached a renovating movement in the outbreak

of the Populists. It was a revolt of the agricultural and working classes against the commercial class. It has so far come to nothing chiefly because those who engaged in it as little understood their own interests as they did the interest of the country. They went off on a false scent, and barked themselves out of breath and out of repute by a pursuit of that will-o'-the-wisp, cheap money. They left their real grievances in the background. If they had based their claims on free trade, on corrected taxation, on the fitting use of franchises, and pursued these ends with proximate wisdom, the result would have been very different. Any sound issue, as seen in the currency question or in prohibition, is flung hither and thither, or wholly submerged by the vacillating surge of pure politics.

If the workmen could embody their social claims in political doctrines and force them to the front, we should at once have a real controversy, which would lay open methods of improvement. Our politics for thirty years have not taken hold of our social life, have involved the secret victories of an exacting commercial temper, subjecting all things in all excessive and corrupt ways to itself. Our politics, as a simply surface movement, will be more and more the wash of a tide which drags out the filth of a dirty harbor only to bring it back and cast it higher at the next flow.

§ 7. The state of things in England has been remarkably diverse. Rarely has any nation been under the more complete control of a single class than was England in the eighteenth century. The landed interest held in hand both Houses of Parliament and all local government. Politics were correspondingly corrupt. Factions and personal interests everywhere prevailed. The exclusive struggle was for power. At the close of the cen-

tury and at the opening of the nineteenth century, commercial interests gained an unusually rapid expansion. The social and political changes incident to such a shifting of forces were retarded by the reaction in England occasioned by the violence of the French Revolution. Hence there was an accumulation of unsatisfied claims in the commercial class that at length disposed them, and enabled them, to demand immediate concessions. The controversy was wide in its range. It pertained to religious, civil, and political rights. Hence there arose a conflict of classes which has given character to the political life of England for many years. Along the line of pressure between two sets of interests, capable of reconciliation but as yet unreconciled, has arisen a long series of measures by which an equilibrium has been approached.

All the various forms of faith have been conceded political rights. Representation in the House of Commons, which had fallen into the control of the country gentry, was corrected by the Reform Bill of 1832. Great industrial centres gained representation, and thinly occupied or deserted rural districts lost it. By the Act of 1835, the charters of the cities of England — with the exception of London—were restored to a uniform and reasonable basis in the rights enjoyed and privileges conferred. The abuses of centuries were swept away. Then came the repeal of the Corn Laws in 1846, under the lead of such men as Cobden and Bright, a repeal made possible by the unyielding demand of manufacturing interests, and by the new gospel of political economy which had been shaped in harmony with them. How different the conditions of this controversy of protection in the United States. With us the commercial interest has been the aggressive one, while the agricultural interest, feeble and

scattered, has been able to oppose no adequate resistance. When England was breaking down privilege, we were establishing it. When she was overthrowing a ruling class, we were building one up.

The extension of suffrage, in 1867 and 1884, lay in the same direction; as also the reform in county government in 1888. These leading measures were interspersed and supported by many minor ones. A new and better balance of social interests grew up with, and was strengthened by, corrective legislation. Personal claims were crowded into the background, and public attention was directed to adequate and urgent issues.

Under the shadow of this movement, and in sympathy with it, though not directly aided by it, the workmen were able, in 1875, to cast off the bondage of judicial and statute law, discriminating against them in the administration of justice. They were able to assert an identity of rights with their fellow-citizens in seeking their own advancement.

Herein is a reason for the great diversity of development in England and the United States in the present century. Political life, in the one country, was identified with social life. Adequate structural purposes were kept in the foreground. In the other country, an ever more dominant and aggressive commercial temper has prevailed. The general prosperity of the country, relieving the pressure and reducing the sense of wrong, the weakness of the agricultural and working classes and their confused and conflicting apprehension of the injuries suffered by them, have prevented any firm resistance. Political life has thus separated itself from social life, and become a subordinate and corrupt term in the general struggle for wealth and power. Hence the conclusion of what we have said

and have to say—the growth of nationality must always mean the collective growth of political institutions, industrial relations and class dependencies, ever in more harmonious submission and ministration to each other. That political movement which expresses existing social forces is sound and wholesome; that political activity which creates and pursues its own ends is superficial and corrupt. Our nationality is to be fully won or finally lost in the apprehension and pursuit of our social welfare.

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